(30,531)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 566

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, THE MICHIGAN CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, ETC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 13, 1925

[fol. 1] CAPTION—Omitted

[fol. 2] **IN UNITED STATES DISTRICT COURT, DISTRICT OF INDIANA**

No.—

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, THE Michigan Central Railroad Company, The New York, Chicago & St. Louis Railroad Company (Successor by Consolidation to the Lake Erie and Western Railroad Company), and The Pere Marquette Railway Company, Petitioners,

vs.

UNITED STATES OF AMERICA, Respondent

PETITION—Filed June 24, 1924

To the Honorable the Judges of the District Court of the United States in and for the District of Indiana:

The petitioners, Chicago, Indianapolis and Louisville Railway Company, The Michigan Central Railroad Company, The New York, Chicago & St. Louis Railroad Company (successor by consolidation to the Lake Erie & Western Railroad Company), and The Pere Marquette Railway Company, bring this, their petition, against the United States of America.

And thereupon your orators complain and say:

I

[fol. 3] That the Chicago, Indianapolis and Louisville Railway Company (hereinafter referred to as the Monon), is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Indiana, wherein it has its legal domicile, and that it operates by steam, a line of railroad into and through the State of Indiana, extending from Indianapolis, Indiana, to Chicago, Illinois, and from Louisville, Kentucky, through the State of Indiana to Michigan City, Indiana, and that it is engaged in interstate commerce.

That the Michigan Central Railroad Company (hereinafter referred to as The Michigan Central), is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Michigan, having its legal domicile therein, and that it operates, by steam, a line of railroad from the City of Chicago, Illinois, extending in an easterly and westerly direction into and through the northern part of the State of Indiana, and into and through the City of Michigan City, Indiana, and from thence through the States of Michigan, Ohio and the Domininon of Canada, to the City of Buffalo, New York.

That The New York, Chicago & St. Louis Railroad Company succeeded by consolidation to the railroad and property and rights of the Lake Erie and Western Railroad Company, and is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Indiana and other states; that the line of railroad acquired by it through consolidation with the Lake Erie and Western Railroad Company extends from Peoria, Illinois, into and through the State of Indiana, to Sandusky, Ohio, and from Indianapolis, Indiana, to Michigan City, Indiana.

That The Pere Marquette Railway Company (hereinafter referred [fol. 4] to as the Pere Marquette), is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Michigan, and having its legal domicile therein, and that it operates by steam, a line of railroad extending from Chicago, Illinois, in an easterly and westerly direction, into and through the northern part of the State of Indiana, and into and through the City of Michigan City, Indiana, and that it is engaged in interstate commerce.

II

That the Chicago, Lake Shore and South Bend Railway Company (hereinafter referred to as the South Shore), is an electric interurban railway company, incorporated under the laws of the State of Indiana, having its legal domicile in said state, and its principal office at Michigan City, Indiana, and that it operates by electric power, a line of electric interurban railroad, extending from South Bend, Indiana, into and through Michigan City, Indiana, to Kensington, Illinois.

III

That on or about the 7th day of October, 1921, the said, The Chicago, Lake Shore & South Bend Railway Company filed a certain complaint with the Interstate Commerce Commission of the United States against the petitioners herein, the same being docketed on the docket of the Interstate Commerce Commission as number 13205, which said complaint was amended and supplemented by the filing of an amended and supplemental complaint on or about October 27, 1921, a copy of said amended and supplemental complaint being annexed hereto and made a part hereof as Exhibit "A."

[fol. 5] IV

That by the said amended and supplemental complaint the said South Shore Company alleged that the refusal of each of the defendants to enter into reciprocal switching arrangements at Michigan City, Indiana, with complainant, including absorption of switching charges, upon the same terms and conditions as with the other defendants respectively at that point, and to switch between complainant's lines and industries at Michigan City freight transported to or from Michigan City by complainant upon the same terms as those upon which each defendant performs like service for the other de-

fendants respectively, is unjustly discriminatory and unduly prejudicial to complainant and its shippers and traffic and denies to complainant equal facilities of interchange in violation of paragraphs 1 and 3, of Section 3 of the Interstate Commerce Act.

V

That said amended and supplemental complaint prayed that the Interstate Commerce Commission make an order commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said Act; and to establish and put in force and maintain and apply in future arrangements, regulations and provisions for the performance of reciprocal switching with complainant at Michigan City to the extent to which, and on the same terms and conditions as those on which, said defendants and each of them now have in force and maintain and apply such arrangements, regulations and provisions with the other defendants or any of them; and to establish and put in force and maintain and apply in future arrangements, regulations and provisions for the absorption, under their line-haul rates to and from Michigan City, of the charges of complainant for switching carload traffic between complainant's track connection with the Lake [fol. 6] Erie & Western Railroad and industries on complainant's line, all at Michigan City, while absorbing, under the same line-haul rates, and to the extent that they absorb, charges for the like and contemporaneous service of switching like kinds of traffic, under substantially similar circumstances and conditions to and from industries on the respective lines of the other defendants or any of them at Michigan City.

VI

To the said amended and supplemental complaint your orators herein, and each of them, filed an answer before the said Interstate Commerce Commission, denying that the facts and things set forth in said amended and supplemental complaint disclosed any violation of law on their part and praying that the said complaint be dismissed. Copies of said answers are hereto attached and made a part hereof as Exhibit "B-1", etc.

VII

That thereafter, to-wit, on or about the 27th day of January, 1922, a hearing in the above proceeding was begun before an Examiner of the Interstate Commerce Commission, P. O. Carter, Esquire, at Michigan City, Indiana, which said hearing was concluded on February 14, 1922, during which hearing testimony was taken on behalf of the said South Shore Company and on behalf of the defendants in said proceeding, the petitioners herein.

VIII

That thereafter, to-wit: on the 26th day of February, 1923, briefs having been filed by the complainant in said proceeding and by

your petitioners herein, the cause was orally argued before the In-
[fol. 7] terstate Commerce Commission at Washington, D. C. and submitted for decision.

IX

That thereafter, to wit: on the 2nd day of April, 1924, the Interstate Commerce Commission made a report and entered an order in said proceeding, a copy of which report is attached hereto and made a part hereof as Exhibit "C." The order entered by the Commission is as follows, to wit:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, be, and they are hereby, notified and required to cease and desist, on or before July 24, 1924, and thereafter to abstain, from the unjust discrimination and undue prejudice found in said report to result from their refusal to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and from their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant at Michigan City, Ind., upon relatively reasonable terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at that point.

It is further ordered, That said defendants, be and they are hereby, notified and required to establish, on or before July 24, 1924, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in Section 6 in the Interstate Commerce Act, and thereafter to maintain and apply rates, regulations, and practices which will prevent [fol. 8] and avoid the aforesaid unjust discrimination and undue prejudice.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, Division 3.

George B. McGinty, Secretary. (Seal.)

That while said report and said order were made on April 2, 1924, they were not served on the petitioners herein until on or about May 6, 1924.

X

That thereafter, and on or about May 26, 1924, your petitioners herein filed with the Interstate Commerce Commission a petition

for a re-argument before the full Commission, of said cause, and for an extension of the effective date of the said order entered therein on April 2, 1924. That said petition for a re-argument and postpon-ment of the effective date of the order in said cause was denied by the Interstate Commerce Commission on June 17, 1924, and your petitioners herein received a copy of the order of the Commission denying said petition for a re-argument, on June 19, 1924. That on June 21, 1924, said Commission amended its said order of April 2, 1924, so as to provide for compliance therewith on ten days' notice instead of thirty days.

XI

That a map, showing the location of your petitioners' lines and the South Shore Company's line at Michigan City, Indiana, and also showing distances between the junction points of said lines at said place, is attached hereto and made a part hereof, as Exhibit "D."

XII

That under said order of the said Interstate Commerce Commission, your petitioners must either cease and desist from performing [fol. 9] reciprocal switching for each other at Michigan City, Indiana, and interchanging traffic with each other at said point, or must enter into reciprocal switching arrangements with the complainant herein. Your petitioners aver that it would be contrary to and against the public interest for them to cease and desist from performing reciprocal switching for each other and interchanging traffic with each other at Michigan City, and that there exists a public necessity at said point for the interchange of traffic between your petitioners and for the reciprocal switching arrangements which they now have in effect but that no such public necessity exists for interchanging traffic with the South Shore Company or entering into reciprocal switching arrangements with it, and that therefore, in order to comply with such order, your petitioners would be required to enter into reciprocal switching arrangements with said South Shore Company and interchange traffic with it.

XIII

Your petitioners aver that they, and each of them, have large and extensive terminal facilities at Michigan City, Indiana, and have the necessary cars and equipment to handle and care for a large amount of traffic and business at that point; that the South Shore Company's facilities at said point are limited and inadequate to handle a large volume of traffic and that it has but a small number, to wit, thirty-six freight cars, all of which facts are found in the said report and finding of said Commission, attached hereto as Exhibit "E."

XIV

Your petitioners further aver that the business of all of the industries located on their lines at Michigan City, Indiana, is being adequately and properly handled by these petitioners, and was being adequately and properly handled at the time of the hearing in said [fol. 10] cause, which fact was found by the said Interstate Commerce Commission.

XV

That the said South Shore Company originates no business, and has no business which it can interchange with these petitioners and on which these petitioners can secure a line haul, but that these petitioners originate a great deal of business at Michigan City and elsewhere upon which a line haul could be procured by the South Shore Company if the said petitioners were required to enter into reciprocal switching arrangements with it, thereby depriving these petitioners of a line haul on said business; that there is no public necessity requiring these petitioners to interchange traffic with the said South Shore Company or to enter into reciprocal switching arrangements with it, and that no industry, shipper or receiver of freight, at Michigan City, Indiana, or elsewhere, is unduly or unlawfully discriminated against or unduly or unlawfully prejudiced by reason of the fact that your petitioners herein do not interchange traffic or have reciprocal switching arrangement in effect with the South Shore Company at Michigan City.

XVI

Your petitioners allege and charge that while the amended and supplemental complaint filed with the Interstate Commerce Commission in said cause, alleges a violation of Section 3 of the Interstate Commerce Act, that in truth and in fact, the whole and only purpose of the complaint was and is to secure a division of the business, which these petitioners are now adequately handling, with the South Shore Company.

[fol. 11] XVII

Your petitioners allege and charge that said order of the Interstate Commerce Commission is not sustained or supported by the report and findings of fact of said Commission and is therefore unlawful and void, for all and severally, and among others, the following reasons:

(a) The Commission does not report or find that any public necessity exists for the interchanging of traffic and reciprocal switching arrangements between these petitioners and the South Shore Company, and in truth and in fact, no such public necessity exists; that in the absence of a public necessity therefor, an order requiring these petitioners to enter into arrangements with the South Shore Company, the effect of which would be to deprive the petitioners of a

large volume of business which they are now adequately handling, is unlawful and void, and violative of the Fifth Amendment to the Constitution of the United States.

(b) That the report and finding of facts of the Commission show that the circumstances and conditions under which the petitioners perform reciprocal switching and interchange traffic with each other at Michigan City, are entirely dissimilar from the circumstances and conditions under which they will be required to perform reciprocal switching and interchange traffic with the South Shore Company under the order of the Commission.

(c) That the order of the Commission is broader than is warranted by its report and by the facts found by it, because the Commission finds that all of the industries on the lines of the petitioners herein are being adequately served, and the order requires these petitioners to either refrain from interchanging cars with each other and performing reciprocal switching with each other, or enter into reciprocal switching arrangements and interchange cars with the complainant, regardless of the destination or origin of said cars; that if any discrimination or undue prejudice exists as to the three industries located on the South Shore Company's line at Michigan City, that can be removed by an order requiring these petitioners to switch cars to and from said three industries.

[fol. 12] XVIII

Your petitioners aver and charge, that said order of the Commission is not based on any substantial evidence which supports and justifies it, for all and severally, among others, the following reasons:

(a) The evidence introduced at the hearing of said case before the Commission does not show that complainants, or its shippers, or any other persons whomsoever, are subjected to any undue or unlawful discrimination, prejudice or disadvantage by reason of the fact that these petitioners interchange cars and have reciprocal switching arrangements between themselves at Michigan City, Indiana.

(b) No evidence was introduced at the hearing of said case before said Commission, showing any public necessity for the relief prayed. Inasmuch as entering into reciprocal switching arrangements by these petitioners with the South Shore Company and the interchange of traffic with the South Shore Company, will require these petitioners to give to the South Shore Company the use of their terminal facilities at Michigan City, such an order must be based on a finding that it is in the public interest and practicable to do so, as required by paragraph 4 of Section 3 of the Interstate Commerce Act.

(c) The establishment of reciprocal switching arrangements and the interchange of cars between these petitioners and the South Shore Company, will result in the establishment of through routes and rates, which, under paragraph 3 of Section 15 of the Interstate Commerce Act, can only be ordered put in effect upon a finding that it is neces-

sary or desirable in the public interest. The evidence introduced at the hearing of said case before the Commission does not show that it is necessary or desirable in the public interest that the petitioners herein be required to interchange cars with the South Shore Company or enter into reciprocal switching arrangements with it at Michigan City.

(d) The evidence introduced at the hearing, before the Commission in said case, affirmatively shows that the convenience of the public and public necessity do not require the interchanging of traffic [fol. 13] or the entering into of reciprocal switching arrangements between the petitioners herein and the South Shore Company at Michigan City.

(e) The evidence introduced at the hearing in said cause, affirmatively shows that there is no undue or unlawful discrimination or prejudice against the complainant or its shippers, by reason of the fact that petitioners herein do reciprocal switching with each other and interchange traffic with each other at Michigan City.

(f) The evidence introduced at the hearing of said case before the Commission affirmatively shows that said case was brought by the South Shore Company against the petitioners herein solely for the purpose of securing business of the petitioners herein, which is now being adequately and satisfactorily handled by them.

(g) The evidence shows that the circumstances and conditions under which the petitioners perform reciprocal switching and interchange traffic with each other at Michigan City, are entirely dissimilar from the circumstances and conditions under which they will be required to perform reciprocal switching and interchange traffic with the South Shore Company under the order of the Commission.

XIX

Your petitioners allege that the report and conclusion of the Commission that the South Shore Company and its shippers are subjected to unjust discrimination and undue prejudice, by reason of the fact that the petitioners herein do not interchange cars or perform reciprocal switching with the South Shore Company, is not sustained nor supported by the evidence and is not based on any substantial or sufficient evidence, for the reason, among others, that the evidence does not show that any competition exists between the industries and shippers located on the lines of these petitioners and served by them at Michigan City and the industries and shippers located on the line of the South Shore Company at Michigan City.

[fol. 14] XX

Your petitioners allege and aver that the said report and order of the Interstate Commerce Commission are unlawful and void for the reasons, among others, that these petitioners cannot comply with the alternative given by said report and order, of ceasing and desisting

from interchanging traffic between themselves and performing reciprocal switching for each other, for the reason that the public interest and necessity and the obligation put upon these petitioners by the Interstate Commerce Act to establish necessary through routes and rates, absolutely prevents these petitioners from canceling and annulling said interchange and reciprocal switching arrangement; and with respect to the other alternative contained in said report and order, requiring these petitioners to enter into the same or similar interchange and switching arrangements with the South Shore Company, the evidence introduced at the hearing of said case show that a compliance with that part of the order would be against public interest.

XXI

Your petitioners aver that neither the Act of Congress known as the "Interstate Commerce Act," nor any other law, confers upon the Interstate Commerce Commission authority to make the order referred to, and quoted above in this petition, and that the same is consequently unconstitutional and unlawful.

XXII

Your petitioners avers and charge that the said order of the Commission is arbitrary and illegal and in violation of the provisions of the Fifth Amendment to the Constitution of the United States pro- [fol. 15] hibiting deprivation of life, liberty or property without due process of law, in that, although there was no evidence introduced at the hearing before the Commission, and the Commission fails to find, that it will be in the public interest or that any public necessity exists for the interchanging of cars, and for reciprocal switching ar--angements between these petitioners and the South Shore Line, yet the Commission nevertheless undertakes to require these petitioners to enter into such arrangements with the South Shore Line and thereby bring about a diversion of the business and traffic and a loss of property of these petitioners to the South Shore Line, or else cancel and annul the reciprocal switching and interchange arrangements which the petitioners have with each other.

That your petitioners are therefore presented with the alternative of either opening up their large and extensive terminal facilities at Michigan City for the use and benefit of the South Shore Line or canceling their interchange and reciprocal switching arrangements in effect between themselves at Michigan City. That a real public necessity exists for said interchange and reciprocal switching arrangements between petitioners at Michigan City, and that the cancellation of said arrangements would result not only in a loss of the property of these petitioners, but would also be contrary to the public interest and necessity, and unlawful.

XXIII

That the evidence introduced at said hearing before the Interstate Commerce Commission, shows that the lines of railroad of these pe-

titioners reach and serve every locality reached by the line of the South Shore; that the line of railroad of the petitioner, Michigan Central Railroad, closely parallels the line of the South Shore from Michigan City to Kensington, Illinois; that the South Shore line originates and has no business to give to these petitioners upon which [fol. 16] they can obtain a line haul, but that it is seeking to obtain the use of the large and extensive terminal facilities of these petitioners at Michigan City simply for the purpose of securing traffic consigned from and to industries located on the lines of these petitioners at Michigan City and which industries are now being adequately served by these petitioners. That under these circumstances the order of the Interstate Commerce Commission is unlawful and void and deprives these petitioners of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

XXIV

Petitioners allege that the order of the Interstate Commerce Commission is unlawful and invalid because the said Interstate Commerce Commission is without jurisdiction over electric interurban railways of the kind which the evidence shows the South Shore Company to be.

XXV

That the said unlawful order of the Interstate Commerce Commission made and promulgated, as aforesaid, will, unless the same be enjoined and set aside, annulled and suspended by your Honorable Court, subject your petitioners to a multiplicity of suits for heavy penalties and forfeitures and a multiplicity of suits for the enforcement of the said order and for damages to shippers by reason thereof, and will produce irreparable damage to your petitioners.

XXVI

Your petitioners further show that if they should be required to comply with the said order, even temporarily, pending final adjudi- [fol. 17] cation thereof of its lawfulness, they would be without means of reparation for the loss to which they would thereby be unlawfully subjected, since they would be put to the alternative, either of entering into interchange and reciprocal switching arrangements with the South Shore line, with the consequent loss of traffic, or of canceling and annulling the interchange and reciprocal switching arrangements which the petitioners have between themselves at Michigan City which would be against the public interest and convenience and would result in suit or suits for the restoration of such interchange and reciprocal switching arrangements which would result in a loss of property of the petitioners herein.

In consideration whereof, for as much as your petitioners are remediless in the premises at or by the strict rule of common law, and are only relievable in a court of equity, where matters of this kind are properly cognizable and reviewable under the act herein-

before mentioned, your petitioners pray that a preliminary or interlocutory order or injunction be entered restraining and suspending the order of the said Interstate Commerce Commission until the final determination of this cause, and that, upon the final hearing of this suit, a decree be entered herein enjoining, setting aside, annulling and suspending the said order of the Interstate Commerce Commission and enjoining the enforcement of said order.

Your petitioners further pray that your Honors direct that due and proper notice of this petition for injunction be served forthwith on the respondent herein, on the Attorney General of the United States, and on the Interstate Commerce Commission.

Your petitioners further pray that your Honors may grant unto said petitioners a writ of subpœna directed to the said respondent, the United States of America, commanding it, on a certain day therein to be specified, to appear before this Honorable Court, and then and [fol. 18] there full, true and complete answer make to all and singular the allegations of this petition, but not under oath (an answer under oath being hereby expressly waived), and to perform and abide by such order and decree herein as your Honors shall deem meet and agreeable to equity and good conscience.

And your petitioners will ever pray, etc.

William S. Taylor, L. P. Day, C. C. Hine, Solicitors for Petitioners. W. J. Stevenson, W. K. Williams, of Counsel.

[fol. 19] Jurat showing the following was duly sworn to by E. P. Vernia omitted in printing.

[fol. 20] EXHIBIT "A" TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 13205

THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY, Complainant,

vs.

THE LAKE ERIE & WESTERN RAILROAD COMPANY, THE MICHIGAN Central Railroad Company, Pere Marquette Railway Company, and Chicago, Indianapolis & Louisville Railway Company, Defendants.

Amended and Supplemental Complaint

The amended and supplemental complaint of the above named complainant respectfully shows:

I

That complainant is, and at all times hereinafter mentioned has been, a corporation organized and existing under the laws of the State

of Indiana, with its principal office at Michigan City, Indiana, operating an electric railway extending from South Bend, Indiana, to Kensington, in the City of Chicago, Illinois, and passing through Michigan City, and is a common carrier engaged in the general transportation of passengers and property between points in the said states and points in other states of the United States and as such is subject to the provisions of the Interstate Commerce Act.

II

That the defendants above named are common carriers engaged in the transportation of passengers and property wholly by railroad between points in Indiana, including Michigan City, and points [fol. 21] in other states of the United States and as such are subject to the provisions of the Interstate Commerce Act.

III

That at Michigan City complainant's line connects, by means of a switch connection, with the lines of defendant, The Lake Erie & Western Railroad Company; the line of said defendant connects, by means of switch connections, with the respective lines of defendants. The Michigan Central Railroad Company and Chicago, Indianapolis & Louisville Railway Company; the line of said last named defendant connects, by means of a switch connection, with the line of defendant, Pere Marquette Railway Company; and all of said connections are, and for many years past have been used for the physical interchange of freight moving between Michigan City and points in other states of the United States.

IV

That each of defendants for many years past has maintained, and now maintains, with each other defendant, an arrangement for the performance of reciprocal switching between their respective lines at Michigan City, as set forth in the following tariffs:

L. E. & W. R. R., I. C. C. No. 3098, effective July 1, 1921.
M. C. R. R., I. C. C. No. 5393, effective August 25, 1921.
C. I. & L. Ry., I. C. C. No. 3495, effective August 1, 1916.
P. M. Ry., I. C. C. 4315, effective January 31, 1921.

V

That complainant has been at all times herein mentioned and is now, physically able to interchange freight between its line and the [fol. 22] respective lines of defendants at Michigan City and ready and willing to afford all reasonable, proper and equal facilities for the interchange of freight traffic between its line and the respective lines of defendants at the said point, and ready and willing to enter into reciprocal switching arrangements at the said point with the several defendants to the extent to which, and on the same terms and con-

ditions as those on which, the several defendants have entered into such arrangements with the other defendants respectively at the same point.

VI

That each of defendants has refused at all times herein mentioned, and does now refuse, to enter into reciprocal switching arrangements at Michigan City with complainant (to the extent to which, and) on the same terms and conditions as those on which it has entered into such arrangements with the other defendants respectively at the same point; and has likewise refused and does now refuse to switch, between complainant's switch connection with the Lake Erie & Western Railroad and industries on the lines of defendants, all at Michigan City, freight which is transported to or from Michigan City by complainant, to the extent to which, and on the same terms and conditions as those on which, it switches, between the respective lines of the other defendants at Michigan City and said industries, freight which is transported to or from Michigan City by such other defendants respectively.

VII

That the circumstances and conditions surrounding the movement of traffic by the defendants or any of them between complainant's switch connection with the Lake Erie & Western Railroad and industries on the lines of defendants or any of them, all at Michigan [fol. 23] City, are in all respects substantially similar to those surrounding the movement of traffic by the defendants or any of them between the defendants' several lines at said point and said industries.

VIII

That by reason of the facts hereinbefore in paragraphs III, IV, V, VI and VII alleged each of defendants has given to each other defendant and to shippers and localities served by each other defendant and to the traffic moving over the line of each other defendant an undue and unreasonable preference and advantage, and the defendants and each of them have subjected complainant and the shippers and localities served by complainant and the traffic moving over complainant's line to an undue and unreasonable prejudice and disadvantage, all in violation of paragraph (1), section 3, of the Interstate Commerce Act; and the defendants and each of them have denied complainant all reasonable, proper and equal facilities for the interchange of traffic between its line and the respective lines of defendants and for the receiving, forwarding and delivering of property to and from complainant's line and the respective liens of defendants, and have discriminated in their rates and charges against complainant and in favor of one another, and have unduly prejudiced complainant in the distribution of traffic that is not specifically routed by the shipper, all in violation of paragraph (3), section 3, of the Interstate Commerce Act.

IX

That, in accordance with the provisions of their respective tariffs referred to in paragraph IV hereof, each of defendants, The Michigan Central Railroad Company, Pere Marquette Railway Company and Chicago, Indianapolis & Louisville Railway Company, delivers inbound traffic to and receives outbound traffic from industries at Mich-
[fol. 24] igan City located on the respective lines of the other defendants without any charge in addition to the line haul rate, but at the same time fails, neglects and refuses to deliver inbound traffic to and receive outbound traffic from industries at Michigan City located on complainant's line without any such additional charge, and permits the lawful switching charges of complainant at Michigan City to accrue on such traffic in addition to the line haul rate.

X

That complainant's charges as set forth in its tariff I. C. C. No. 67, effective January 1, 1921, for switching carload freight between its switch connection with the Lake Erie & Western Railroad and industries on its line, all at Michigan City, are the same as the charges of the several defendants for switching such freight to or from industries on their respective lines at Michigan City, and the said switching services of complainant and of the several defendants at the said point are like services performed on like traffic under substantially similar circumstances and conditions.

XI

That by reason of the facts hereinbefore in paragraphs IX and X alleged each of defendants, The Michigan Central Railroad Company, Pere Marquette Railway Company and Chicago, Indianapolis & Louisville Railway Company, charges demands, collects and receives from shippers or receivers of freight transported between points on its line and industries at Michigan City on complainant's line a greater compensation for a service rendered in the transportation of property subject to the provisions of the Interstate Commerce Act than it charges, demands, collects and receives from shippers or receivers of freight transported between points on its line and industries at Michigan City on the respective lines of the other defendants for doing for them a like and contemporaneous service in the
[fol. 25] transportation of like kinds of traffic under substantially similar circumstances and conditions, all in violation of Section 2 of the Interstate Commerce Act.

Wherefore, complainant prays that defendants may be severally required to answer the charges herein, and that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said Act; and to establish and put in force and maintain and apply in future arrangements, regulations and provisions for the per-

formance of reciprocal switching with complainant at Michigan City to the extent to which, and on the same terms and conditions as those on which, said defendants and each of them now have in force and maintain and apply such arrangements, regulations and provisions with the other defendants or any of them; and to establish and put in force and maintain and apply in future arrangements, regulations and provisions for the absorption, under their line haul rates to and from Michigan City, of the charges of complainant for switching carload traffic between complainant's track connection with the Lake Erie & Western Railroad and industries on complainant's line, all at Michigan City, while absorbing, under the same line haul rates, and to the extent that they absorb, charges for the like and contemporaneous service of switching like kinds of traffic, under substantially similar circumstances and conditions to and from industries on the respective lines of the other defendants or any of them at Michigan City; and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Illinois, October 24, 1921.

Butler, Lamb, Foster & Pope, Attorneys for Complainant, 1414 Monadnock Block, Chicago, Illinois. F. J. Lewis Meyer, Ernest S. Ballard, James Dale Thom, of Counsel.

[fol. 26] EXHIBIT "B-1" TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 13205

THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY, Complainant,

vs.

THE LAKE ERIE & WESTERN RAILROAD COMPANY et al., Defendants

Answer of Chicago, Indianapolis and Louisville Railway Company to the Amended and Supplemental Complaint

The defendant, Chicago, Indianapolis and Louisville Railway Company, for answer to the amended and supplemental complaint in this proceeding, respectfully states:

I

This defendant neither admits nor denies the allegations contained in paragraph 1 of said amended and supplemental complaint.

II

This defendant admits that it is a common carrier engaged in the interstate transportation of passengers and property.

III

This defendant neither admits nor denies the allegations contained in paragraph III of said amended and supplemental complaint, but asks that complainant be required to make strict proof thereof.

This defendant says that there is no physical connection between [fol. 27] the complainant's line of railroad and the line of this defendant.

IV

This defendant says that it has a direct physical connection with each of its co-defendants at Michigan City, Indiana, and that it has an arrangement for the performance of reciprocal switching with each of its co-defendants.

V

This defendant denies the allegations contained in paragraph V of said amended and supplemental complaint, and specifically denies that said complainant is able to interchange freight between its line and the line of this defendant.

VI

This defendant denies the allegations contained in paragraph VI of said amended and supplemental complaint, and says that it is not possible to enter into reciprocal switching arrangements with complainant at Michigan City to the extent and on the same terms and conditions as this defendant has made arrangements for reciprocal switching at Michigan City, Indiana, with its co-defendants.

VII

This defendant denies the allegations contained in paragraph VII of said amended and supplemental complaint.

VIII

This defendant denies the allegations contained in paragraph VIII of said amended and supplemental complaint.

[fol. 28] IX

This defendant admits that it delivers inbound traffic to, and receives outbound traffic from, industries located on the respective lines of its co-defendants under reciprocal switching arrangements.

This defendant says that it has no physical connection with the complainant's line at Michigan City and receives no traffic whatever from the complainant, neither does it deliver any traffic to the complainant.

X

This defendant denies the allegations contained in paragraph X of said amended and supplemental complaint.

XI

This defendant denies the allegations contained in paragraph XI of said amended and supplemental complaint.

XII

Further answering, this defendant says that as hereinbefore in this answer stated, it has no physical connection with the line of the complainant at Michigan City, Indiana; that it has no trackage rights over the line of the Lake Erie & Western Railroad at Michigan City, Indiana; that the complainant herein is seeking to secure the use of this defendant's terminal facilities at Michigan City, for the purpose of getting a line haul on business consigned to and from industries located on this defendants' line at Michigan City, and which are now [fol. 29] adequately served by this defendant, and to accommodate which said business this defendant has expended large sums in providing adequate terminal facilities.

This defendant further answering, says that the circumstances and conditions under which it performs reciprocal switching with its co-defendants at Michigan City, and the circumstances and conditions existing in connection with and surrounding the complainant's line at that point, are entirely dissimilar.

Wherefore, this defendant prays that the amended and supplemental complaint in this proceeding be dismissed.

Dated this 10th day of November, A. D. 1921.

Chicago, Indianapolis and Louisville Railway Company, by C. C. Hine, Its General Solicitor.

1422 Transportation Building, Chicago, Illinois.

[fol. 30] EXHIBIT "B-2" TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket N. 13205

THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY, Complainant,

vs.

THE LAKE ERIE & WESTERN RAILROAD COMPANY et al., Defendants

Answer of the Lake Erie & Western Railroad Company, the Michigan Central Railroad Company to Amended and Supplemental Complaint

For answer to the amended and supplemental complaint in the above-entitled cause, these defendants respectfully represent:

I

That they have no knowledge or information with respect to the allegations of Paragraph I of the complaint, and therefore neither admit nor deny the same.

II

That they admit the allegation of Paragraph II of the complaint.

III

That they admit that the complainant's line connects, by means of a switch connection, with the line of defendant, The Lake Erie & [fol. 31] Western Railroad Company, at Michigan City, and that the line of said defendant connects, by means of switch connections, with the respective lines of defendants, the Michigan Central Railroad Company and Chicago, Indianapolis & Louisville Railway Company, but deny the remaining allegations of Paragraph III of the complaint.

IV

These defendants neither admit nor deny the allegations of Paragraph IV of the complaint, but for greater certainty they refer to the tariffs lawfully published and on file with this Commission.

V

They deny the allegations of Paragraph- V and VI of the complaint, and allege that there is now in effect between the complainant and the defendant, the Lake Erie & Western Railroad Company, at Michigan City, the same arrangements for the switching of traffic as exist between that defendant and the other defendants named herein,

as set forth in tariffs lawfully published and on file with this Commission.

VI

They deny that the circumstances and conditions surrounding the movement of traffic by the defendants or any of them between complainant's switching connection with the Lake Erie & Western Railroad and industries on the lines of defendants or any of them, at Michigan City, are in all respects substantially similar to those surrounding the movement of traffic by the defendants or any of them between the defendants' several lines and said industries at Michigan City, as is alleged in Paragraph VII of the complaint.

[fol. 32]

VII

They deny the*h* allegations of Paragraph VIII of the complaint, and aver that the shippers and receivers of freight at Michigan City are adequately served, and that there is an entire absence of any public necessity or demand for additional switching arrangements at that point.

VIII

The defendant, the Michigan Central Railroad Company, admits that it refuses to interchange traffic with the complainant at Michigan City as alleged in Paragraph IX of the complaint, but these defendants deny each and every other allegation thereof.

IX

They deny that the complainant's charges for switching carload freight between its switch connection with the Lake Erie & Western Railroad and industries on its line at Michigan City are the same as the charges of the several defendants for switching such freight to or from industries on their respective lines at that point, and that the said switching services of complainant and of the several defendants are like services performed on like traffic under substantially similar circumstances and conditions, as alleged in Paragraph X of the complaint.

X

They deny the allegations of Paragraph XI of the complaint, and allege that every point reached by the line of the complainant is also [fol. 33] reached and adequately served by the defendant, the Michigan Central Railroad Company, and said defendant is now, and has been in the past abundantly able to handle via its own line all freight traffic between such points and industries located on its rails at Michigan City, while traffic originating at, or destined to, any industries that may be located on the line of the complainant at Michigan City can be handled direct to or from those points via the complainant's line without any charge in addition to the line haul rate.

Further answering the complaint herein, these defendants say that

any requirement for the interchange of traffic between the said defendant, the Michigan Central Railroad Company and the complainant at Michigan City, would result in shorthauling the said defendant, contrary to the provisions of Section 15 of the Act to Regulate Commerce.

Wherefore, the defendants pray that the complaint may be dismissed.

By Clyde Brown, Attorney for Above-named Defendants, 1110-466 Lexington Avenue, New York City.

Dated March 23, 1921.

[fol. 34] EXHIBIT "B–3" TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 13205

THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY, Complainant,

vs.

THE LAKE ERIE & WESTERN RAILROAD COMPANY, THE MICHIGAN Central Railroad Company, Pere Marquette Railway Company, and Chicago, Indianapolis and Louisville Railway Company, Defendants

The answer of the Pere Marquette Railway Company, one of the defendants in the above entitled cause, to the amended and supplemental complaint, respectfully shows:

1. It neither admits nor denies the allegations of the first paragraph of the complaint, but believes them to be true.

2. It admits the allegations of the second paragraph of the complaint.

3. It neither admits nor denies the allegations of the third paragraph of the complaint, but leaves the complainant to its proof thereof.

4. For want of first hand information it neither admits nor denies the allegations of the fourth paragraph of the complaint, but leaves the complainant to its proof thereof, and begs leave to refer to the files and records of the Interstate Commerce Commission for verification of the allegations of that part of the paragraph which makes reference to tariffs.

5. It denies the allegations of the fifth paragraph of the complaint.

[fol. 35] 6. It neither admits nor denies the allegations of the sixth paragraph of the complaint, but leaves the complainant to its proof thereof.

7. It denies the allegations of the seventh paragraph of the complaint.

8. It denies the allegations of the eighth paragraph of the complaint.

9. It neither admits nor denies the allegations of the ninth paragraph of the complaint, but leaves complainant to its proof thereof.

10. It neither admits nor denies the allegations of the tenth paragraph of the complaint, but leaves complainant to its proof thereof.

11. It neither admits nor denies the allegations of the eleventh paragraph of the complaint, but leaves complainant to its proof thereof.

This defendant denies that the complainant is entitled to the relief prayed for or to any relief whatever in the premises and prays that the complaint be dismissed.

Pere Marquette Railway Company, by John C. Bills and Wm. R. Seaton, Its Attorneys.

Business Address: 502 Railway Exchange Building, Detroit, Michigan.

Dated November 3, 1921.

[fol. 36] EXHIBIT "C" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 13205

CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY v. LAKE ERIE & WESTERN RAILROAD COMPANY et al.

Submitted February 26, 1923. Decided April 2, 1924

Defendants' refusal to switch interstate carload traffic in connection with complainant at Michigan City, Ind., and their failure and refusal to enter into arrangements for the performance of reciprocal switching in connection with complainant while contemporaneously switching interstate carload traffic and entering into reciprocal switching arrangements with each other at that point found unjustly discriminatory and unduly prejudicial to complainant and its shippers. Unjust discrimination and undue prejudice ordered removed.

Ernest S. Ballard, F. J. Lewis Meyer, and Butler, Lamb, Foster & Pope for complainant.

Walter K. Greenebaum for Michigan City Chamber of Commerce and Rogers Cox for Manufacturers' Club of Michigan City, interveners.

L. P. Day and C. C. Hine for defendants.

Division 3, Commissioners Hall, Campbell, and Cox

Cox, Commissioner:

Exceptions were filed by defendants to the report proposed by the examiner and the case was orally argued.

Complainant, the Chicago, Lake Shore & South Bend Railway [fol. 37] Company, is an electric line approximately 76 miles long which operates between South Bend, Ind., and Kensington, Ill., a point within the corporate limits of the city of Chicago. By complaint filed October 7, 1921, as amended, it alleges that the refusal of each of the defendants to enter into reciprocal switching arrangements at Michigan City, Ind., with complainant including absorption of switching charges, upon the same terms and conditions as with the other defendants respectively at that point, and to switch between complainant's lines and industries at Michigan City freight transported to or from Michigan City by complainant upon the same terms as those upon which each defendant performs like service for the other defendants respectively, is unjustly discriminatory and unduly prejudicial to complainant and its shippers and traffic and denies to complainant equal facilities of interchange in violation of sections 2 and 3 of the interstate commerce act. We are asked to require the defendants to put in force and apply in the future reciprocal switching arrangements with complainant, including absorption of switching charges upon the same terms and conditions as those now in force and applied by defendants each with the other. The Michigan City Chamber of Commerce and the Manufacturers' Club of Michigan City intervened in support of complainant. Rates are stated in amounts per car unless otherwise indicated.

The Chicago, Lake Shore & South Bend Railway will be referred to hereinafter as the South Shore and the Chicago, Indianapolis & Louisville Railway as the Monon. The South Shore was fully described and its status defined in Chicago, Lake Shore & S. B. Ry. Co. v. Director General, 58 I. C. C., 647. Its president testified that there has been no important change in the construction or operation of its lines since that decision.

At Michigan City the South Shore has a connection and interchange facilities with the Lake Erie & Western. The Lake Erie & [fol. 38] Western also connects directly with the Monon and the Michigan Central. The Monon connects with the Pere Marquette, Lake Erie & Western, and Michigan Central, and acts as an intermediate line for the interchange of freight between points on the Pere Marquette on the one hand and points on the Lake Erie & Western and the Michigan Central on the other. The Lake Erie & Western and Michigan Central do not connect with the Pere Marquette, and the Michigan Central, Pere Marquette, and Monon do not connect with the South Shore.

In Chicago, Lake Shore & S. B. Ry. Co. v. Director General, supra, we directed the Lake Erie & Western to enter into reciprocal switching arrangements at Michigan City with the South Shore to the same extent and upon the same terms and conditions as those upon which it participates in such an arrangement at that point in connection with the Pere Marquette or the Monon. The Lake Erie & Western complied with our order by entering into reciprocal switching arrangements with complainant. In this proceeding complainant asks that we direct the Michigan Central, Pere Marquette, and Monon to enter into reciprocal switching arrangements with the South Shore upon the same terms and conditions as exist between those lines. The Lake Erie & Western is necessarily an intermediate carrier of traffic which may move between the lines of the other three defendants and complainant's line. Under the present arrangements, it does not, and could not, because of its location, act as an intermediate carrier between any of the steam roads at Michigan City. Complainant contends that since that defendant switches for the other defendants to the extent of its ability and has openel its terminals fully to them, it can not at the same time lawfully refuse to perform the intermediate switching service for complainant.
[fol. 39] The switching charges and practices of the various roads at Michigan City at present in effect are as follows:

Michigan Central.—To and from its connections with the Monon and the Lake Erie & Western and on traffic to or from the Pere Marquette from or to its industrial tracks, switching charges of $6.30 apply on local traffic and $4.50 on traffic where a road haul has been or will be performed. The Monon's intermediate-switching charge is added on traffic to or from the Pere Marquette. The Michigan Central absorbs switching charges on loaded cars handled by it in road-haul movement and delivered on tracks of the other steam roads in Michigan City where the minimum road-haul revenue after absorption is $19 per car.

Monon.—To or from industries on the Monon and its connections with the Lake Erie & Western, Michigan Central and Pere Marquette its switching charges are $3.60, $4.50, and 0.5 cent per 100 pounds (minimum $4.50 per car), respectively. Its intermediate switching charge between the lines of the Pere Marquette and Michigan Central is $4.50 and between the Pere Marquette and the Lake Erie & Western, $3.15. The Monon absorbs the switching charges of the other steam roads where the road-haul revenue is at least $12.50 after absorption.

Pere Marquette.—Its switching charge is 0.5 cent per 100 pounds, minimum $4.50, between its private sidings and tracks and its connection with the Monon, $3.60 on traffic between its private and industrial tracks and the Lake Erie & Western, and $3.60 on traffic between its private sidings and the Michigan Central. The Monon's intermediate-switching charges are added on traffic to or from the Lake Erie & Western or the Michigan Central. The Pere Marquette absorbs the switching charges of the other steam roads where the road-haul revenue after the absorption is at least $19.

[fol. 40] Lake Erie & Western.—Its interchange switching charges between its connections with the Michigan Central, Monon, or South Shore is $3.60 to certain industries on its line and $6.30 to certain other industries. On traffic to or from the Pere Marquette the amounts are also $3.60 to certain industries and $6.30 to others, plus the $3.15 intermediate-switching charge of the Monon. Its industrial-switching rate is $4.95 where the interchange-switching charge is $3.60, and $8.10 where the interchange-switching charge is $6.30. It does not publish an intermediate-switching charge applicable on traffic between its connection with the South Shore and its connections with the Michigan Central and the Monon. Absorptions of switching charges are made as shown in its tariffs.

South Shore.—Its switching charge is $4.50 per car between industries on its line and its connection with the Lake Erie & Western. Its tariff authorizes absorption of the switching charges of the steam roads at Michigan City on all traffic moving over its line where the earnings of the South Shore and its connections are at least $15 after absorption.

The Michigan Central, Pere Marquette, and Monon tariffs do not make any provision for reciprocal switching with the South Shore.

Defendants, except the Lake Erie & Western, do not switch traffic to industries on the South Shore or from the South Shore to industries located on their rails. Neither have they in the past except in a few instances. A few shipments destined to industries on the Michigan Central or Monon arrived in Michigan City via the South Shore and were switched as a matter of convenience to the industry and a switching charge was collected in addition to the line-haul rate. Company material consigned to the South Shore is switched over the defendants' lines and the charges are absorbed because the South Shore is named as an industry in the defendants' tariffs. Also in a few cases, cars arriving in Michigan City over the steam lines consigned [fol. 41] to an industry on the South Shore have been delivered to the South Shore either by having the car reconsigned or by changing the billing so as to make the South Shore appear as consignee.

There are three industries located on complainant's line at Michigan City and about 60 industries located on the lines of defendants. Two of the industries on the South Shore have practically no outbound tonnage and their inbound freight consists chiefly of coal, ice and groceries. One of these was located on the Lake Erie & Western rails until December, 1921. The other is located on the Monon as well as on the South Shore, and receives groceries by the electric line and coal via the Monon. The Monon track beside the coal bins is from 50 to 60 feet from the warehouse. These industries compete with industries on the steam roads. The third industry receives and ships in carload and less-than-carload quantities. It is located on the South Shore a short distance from the point where that line is intersected by the Lake Erie & Western tracks. It was formerly served by the Lake Erie & Western whose right of way extends to the fence inclosing the industry's property.

Witnesses for the above industries testified that it would be to

their advantage if the South Shore had reciprocal switching arrangements with all the steam lines at Michigan City. Under the present arrangement they are required to receive traffic transported to Michigan City by the Michigan Central and Pere Marquette on the steam tracks of those roads, and in some instances above referred to they have been required to pay an additional switching charge. Six shippers located on the rails of the Monon, Michigan Central, and Pere Marquette testified that they have used the South Shore for less-than-carload traffic and have received very efficient and expeditious service, in many instances superior to that of the steam roads. If reciprocal switching arrangements were in effect and if [fol. 42] the carload service were as good as the less-than-carload service they would divert a portion of their carload traffic from the steam lines to the South Shore. The service rendered by the steam lines has, on the whole, been satisfactory during the past year. Several shippers located on defendants' lines at Michigan City, including some of the largest shippers of both inbound and outbound freight, testified that the service afforded by the steam lines is entirely adequate, and that they would not be benefited by the establishment of the reciprocal switching arrangements with the electric line.

Exhibits of record shows the number of cars brought into Michigan City by the South Shore and switched to industries on the Lake Erie & Western, and the number of cars brought in by the Lake Erie & Western and switched to South Shore industries. Complainant's exhibits, only slightly at variance from those introduced by defendants, show that during 1921, when reciprocal switching arrangements were in effect between the Lake Erie & Western and the South Shore, the South Shore handled into Michigan City 162 cars which were switched to industries on the Lake Erie & Western. Of this number 29 cars were consigned to complainant's power house prior to October. During the remainder of the year 72 cars were switched to the Northern Indiana Gas & Electric Company, a corporation distinct from the South Shore, which had leased its power house. Therefore, 101 cars of a total of 162 were loaded with coal for the power house which prior to October was controlled by the complainant. In the same year the South Shore switched approximately 17 cars from the Lake Erie & Western to industries on its line. Defendants contend that this statement of the amount of interchange traffic clearly indicates that only a very small number of shippers at Michigan City would be benefited by the extension of interchange switching.

Defendants maintain that this proceeding is merely an attempt by the South Shore to obtain from them traffic which they are now [fol. 43] handling satisfactorily. Complainant's general manager admitted, practically without qualification, that the steam roads were serving their industries adequately at the time of hearing and that the electric line wished to divide the business. Most of the traffic transported by the South Shore to Michigan City consists of coal, lumber, and other commodities received from the Illinois Central,

with which it connects at Kensington and with which it has joint rates. The South Shore tracks parallel the Michigan Central tracks between Michigan City and Kensington, at which point they are but 25 feet apart. Both lines serve Gary and Hammond, Ind., which are the principal stations between Chicago and Michigan City.

Statements were introduced showing the number of cars of outbound interstate tonnage from Michigan City over the Michigan Central and the Monon. During three months in 1920 the Michigan Central had 2,073 outbound cars on which the charges were approximately $135,500 and in the same three months in 1921, 1,112 cars, with charges amounting to approximately $70,856. During the same three months in 1920 the outbound tonnage on the Monon amounted to 300 cars, on which the charges were approximately $10,400, and, in 1921, 190 cars with total charges amounting to approximately $7,400.

Statements were also introduced showing the inbound interstate movement of cars to Michigan City over these roads upon which complainant might have received the line-haul movement had reciprocal switching been in effect. During three representative months of each year the number of such cars over the Michigan Central in 1920 was 51, on which its proportion of the revenue was $1,767.01; in 1921, 57 cars on which its proportion of the revenue was $2,243.49. Had the South Shore enjoyed the line-haul movement, the Michigan Central's revenue on these cars would have been reduced to $255 in 1920 and $285 in 1921. During the same representative [fol. 44] months the Monon hauled 413 such cars in 1920 and received $17,030.84 as its proportion of the charges; in 1921, 232 cars, with revenue therefrom of $21,966.29. If reciprocal switching had been in effect, the South Shore might have obtained the line-haul movement and reduced the Monon's share of the charges on these cars to $1,239 in 1920 and $928 in 1921.

Freight equipment available early in 1922 amounted to 34,518 cars on the Michigan Central and 5,254 cars on the Lake Erie & Western. The South Shore has 36 freight cars, the same number it had at the time of the hearing in Chicago, Lake Shore & S. B. Ry. Co. v. Director General, supra, decided August 4, 1920. Each of the defendant lines has extensive terminal facilities at Michigan City, while the South Shore's facilities are limited and inadequate to handle a large volume of traffic.

Defendants testified that available routes to all parts of the country are afforded by the steam lines. The Monon is crossed by the New York Central; Wabash; Baltimore & Ohio; Grand Trunk; Pennsylvania; New York, Chicago & St. Louis; and Erie. The Michigan Central has direct connection with the Illinois Central at Kensington and with western roads at Joliet. Between Michigan City and Chicago the Michigan Central main line is crossed by the New York Central; Wabash; Baltimore & Ohio; New York, Chicago & St. Louis; Elgin, Joliet & Eastern; Chicago & Erie; Monon, Indiana Harbor Belt; and Illinois Central and other lines. From East Gary to Joliet running north and south the Michigan Central crosses various railroads.

Defendants, citing Village of Hubbard, Ohio, v. United States, 278 Fed., 754, contend that complainant is not a common carrier within the meaning of the interstate commerce act. We specifically found that it was engaged in the general transportation of freight in Indiana Passenger Fares of C., L. S. & S. B. Ry. Co., 69 I. C. C., 180, and this record does not refute that finding.

[fol. 45] Defendants contend that they can not be required to enter into reciprocal switching arrangements with the South Shore unless such arrangements can be found to be necessary and desirable in the public interest. They urge that the principle governing the establishment of through routes and joint rates likewise applies to the establishment of reciprocal switching and cite numerous decisions wherein we found that we could require through routes and joint rates only where the interest of the public would be served. In fact, they urge that the test of public convenience and necessity must be applied as stringently as if we were asked to authorize the construction of a new line of railroad. They contend that no such showing has been made. The Michigan Central contends that if we grant complainant's prayer it will be required to switch at Michigan City traffic which originates on its own line because every point of importance reached by the South Shore between Michigan City and Chicago is also served by the Michigan Central's main line. Our powers under paragraph (4) of section 3 of the interstate commerce act to require the joint use of terminals are not here invoked. Nor does the provision against short-hauling a carrier in section 15 justify a violation of another section. The terminals of defendants are open except to the South Shore. We are asked to require by alternative order the defendant steam carriers to accord to complainant and its shippers and traffic the same rights and privileges which each of the defendants contemporaneously accord to each of the other defendants and its shippers and traffic. The question before us is whether the circumstances surrounding complainant and its traffic are so dissimilar as to justify the present difference in treatment.

The establishment of reciprocal switching from or to the South Shore to or from the Pere Marquette would require three interchanges, and to or from the Michigan Central or the Monon, two interchanges. [fol. 46] Under the existing reciprocal switching arrangements between the steam lines only the movements between the Pere Marquette and the Lake Erie & Western or the Michigan Central require two interchanges. A witness for the Michigan Central testified that if reciprocal switching arrangements with the South Shore are put into effect the average time required for the switch movement from the South Shore to an industry on the Michigan Central would be two days. Cars arriving in Michigan City over the Michigan Central at the present time are placed at its industries the same day or the next morning.

Traffic switched to or from the South Shore from or to the steam lines would require intermediate switching over the steam lines for the following distances: (a) From or to the Pere Marquette and Monon connection to or from the Lake Erie & Western and South Shore connection, 20,500 feet or 3.88 miles; (b) from or to the

Michigan Central and Lake Erie & Western connection to or from the Lake Erie & Western and South Shore connection 7,300 feet or 1.38 miles; (c) from or to the Lake Erie & Western and Monon connection to or from the Lake Erie & Western and South Shore connection, 9,300 feet or 1.76 miles.

The intermediate distances traversed by the steam lines in switching traffic to or from each other are as follows: (a) From or to Pere Marquette and Monon connection to or from Lake Erie & Western & Monon connection, 11,200 feet or 2.12 miles; (b) from Pere Marquette and Monon connection to Monon delivery to Michigan Central 2,600 feet or 0.49 mile; (c) from Michigan Central delivery to Monon to Pere Marquette and Monon connection 7,200 feet or 1.36 miles.

It was testified that the steam lines not only perform valuable services for each other at Michigan City, but also perform reciprocal switching at other points, and that the South Shore is not able to perform any reciprocal service at any other point and only an inconsequential service at Michigan City. That ground for refusing [fol. 47] to enter into reciprocal switching arrangements was rejected in Buffalo, Rochester & Pittsburgh Ry. v. Pennsylvania Co., 29 I. C. C., 114. In Switching at Galesburg, Ill., 31 I. C. C., 294, we found that it was unjustly discriminatory against the Rock Island Southern for the Chicago, Burlington & Quincy Railroad to refuse to switch the former's traffic while at the same time switching traffic for the Atchison, Topeka & Santa Fe. The issues and circumstances in that case were very similar to those here under consideration, the chief difference being that the Burlington and Santa Fe had a direct physical connection with the Rock Island Southern. The question of absorptions was not involved in that case. In so far as amendments to the act enacted since those decisions were rendered may have any bearing on the present issues, they have not limited our powers.

The fact that the Lake Erie & Western will be required, if reciprocal switching is maintained, to act as an intermediate carrier of traffic to or from complainant's line is an accident of location and not a transportation difference. In length of haul or use of intermediate line the situation of the South Shore with respect to the Michigan Central or the Monon is clearly not dissimilar from the situation of the Pere Marquette with respect to the Michigan Central or the Lake Erie — Western. Nor is the fact controlling that three interchanges and a somewhat longer intermediate haul may be required on traffic to or from the Pere Marquette. Each defendant holds itself out to switch practically all traffic of any other defendant, regardless of the length of the switching haul or point of origin or destination of shipment. The contemporaneous refusal to switch traffic for complainant is a denial to it of reasonable, proper, and equal facilities for the interchange of traffic.

Defendants' switching charges and absorptions differ in amount. The measure of the switching charges is not in issue. In our dis- [fol. 48] cussion of section 2 of the act in Richmond Chamber of Commerce v. S. A. L. Ry., 44 I. C. C., 455, 466, we said:

* * * It is the line-haul movement which that section primarily contemplates. Where the short delivery service within the switching district is substantially the same in either instance, we are of the opinion that the line-haul carrier is receiving a greater compensation from one shipper than from another for a like service when it absorbs the switching charges of one switching line and not those of another.

* * * * * * *

We do not consider that the carriers must absorb the switching charges indiscriminately to all industries within the switching limits of Richmond if they choose to absorb the switching charges to any one industry off their rails. The illegality herein found to exist is the receiving of a greater compensation for one service than for a like service under substantially similar circumstances and conditions. To take a concrete example and referring again to the diagram. Suppose industry C were 5 miles distant from the interchange tracks of the Seaboard, while industry B were only 2 miles distant. Suppose the Chesapeake & Ohio's switching charge amounted to $5, while that of the Southern was $2. If the Seaboard absorbed the Southern's $2 switching charge on traffic to industry B, we do not consider that it must absorb the entire $5 switching charge of the Chesapeake & Ohio on traffic to industry C, but only to the extent to which the service is similar. In other words, it would probably be necessary for the Seaboard to absorb $2 of the $5 charge of the Chesapeake & Ohio.

Upon appeal to the courts the latter paragraph was quoted in Seaboard Air Line Ry. Co. v. United States, 254 U. S., 57. To apply the above illustration to the present situation, if defendants continue the absorption of switching charges at Michigan City and the Monon can reach any industry on any other defendant's rails by a maximum absorption of $6.30 per car, removal of the unjust discrimination against industries on complainant's lines would not require the absorption of a greater amount on traffic destined to or originated at such industries.

[fol. 49] We find that the refusal of defendants to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and the failure and refusal of the defendants to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant upon relatively reasonable terms, based upon a careful consideration of the similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in such arrangements with each other at that point, subjects complainant and its shippers to unjust discrimination and undue prejudice which will be ordered removed.

An appropriate order will be entered.

[fol. 50] ORDER

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 3, HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 2ND DAY OF APRIL, A. D. 1924.

No. 13205

THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY

v.

THE LAKE ERIE & WESTERN RAILROAD COMPANY, THE MICHIGAN Central Railroad Company; Pere Marquette Railway Company, and Chicago, Indianapolis & Louisville Railway Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its finding of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before July 24, 1924, and thereafter to abstain, from the unjust discrimination and undue prejudice found in said report to result from their refusal to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and from their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant at Michigan City, Ind., upon relatively reasonable [fol. 51] terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at that point.

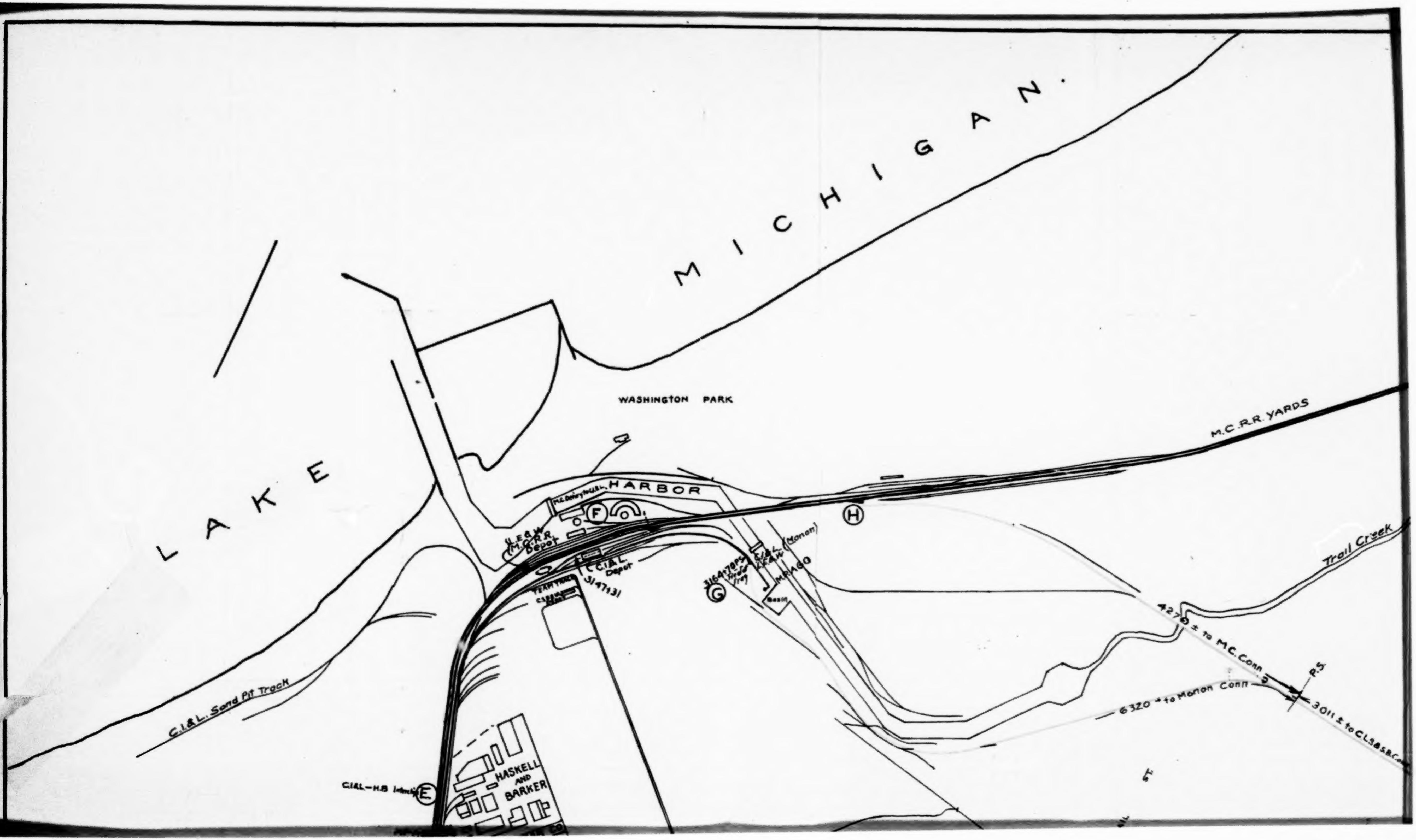
It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before July 24, 1924, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid unjust discrimination and undue prejudice.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the Commission, Division 3.

George B. McGinty, Secretary. (Seal.)

(Here follows Exhibit "D," marked side folio page 52.)


LAKE MICHIGAN.
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HARBOR
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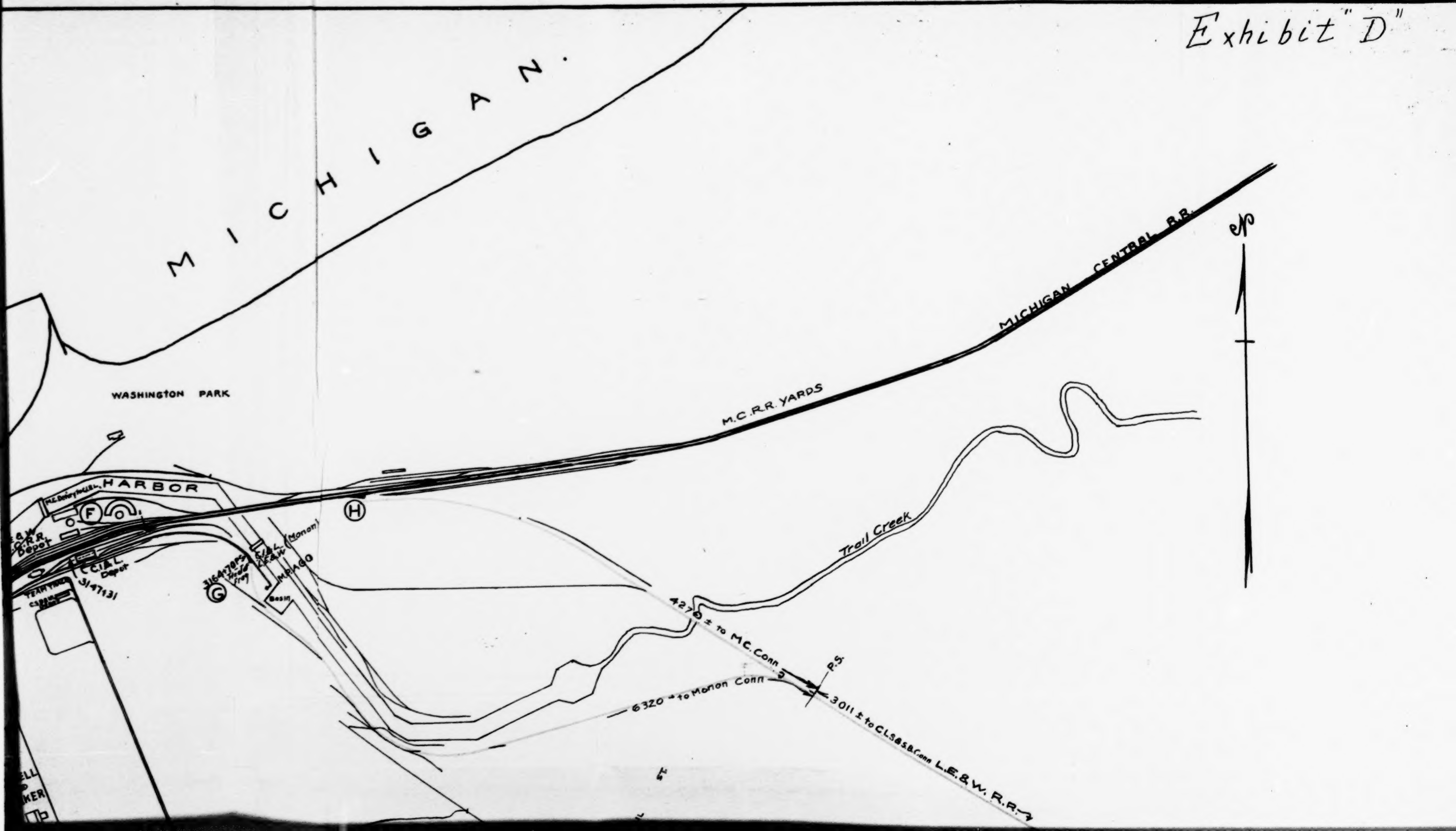
3147+31
TEAM YARD
G
3164+70 P.S.
Frog
C.I.&L.
L.E.&W.
(Monon)
M.P.&C.O.
Basin
Trail Creek
4270 ± to M.C. Conn
P.S.
6320 ± to Monon Conn
3011 ± to C.L.S.&S.B.Co.
C.I.&L. Sand Pit Track
C.I.&L.-H.B. Interlg.
E
HASKELL AND BARKER
ST.

fol.

Exhibit "D"


MICHIGAN.
MICHIGAN CENTRAL R.R.
M.C.R.R. YARDS
WASHINGTON PARK
HARBOR
F
H
G
C.I.&L. Depot
31471 31
C.I.&L. (Monon)
L.E.&W.
M.P.&G.O.
Basin
Trail Creek
4270 ± to M.C. Conn
P.S.
6320 ± to Monon Conn
3011 ± to C.L.S.&S.B. Conn
L.E.&W. R.R.

C.I.&L.—H.B Interch (E)

MP A-59

BARKER CAR CO

C.L.S.&S.B.RY.

C.L.S.&S.B. FREIGHT HOUSE

Clow Siding

3097+04 C.L.S.&S.B. CROSSING (D)

Keppen Siding

C.L.S.&S.B. Ticket Office

Rock Siding

School Siding C.L.S.&S.B.RY.

VAIL

AVE

SHERIDAN

Passing Track

3085+54 End K.M.

H. & B. New Car Delivery to C.I.&L. (C)

INDIANA STATE PRISON

(B)

3073+29 End C.I.&L.

HASKELL & BARKER CAR CO

C.I.&L.RY

M.P. Post A-58

MICHIGAN CENTRAL R.R.

3056+49 P.S.

Switch Diagram

338' C.I.&L.

PM

(A) C.I.&L.—P.M. Conn

PERE MARQUETTE R.R.

C.S.B.&N.I.RY.

DEPOT

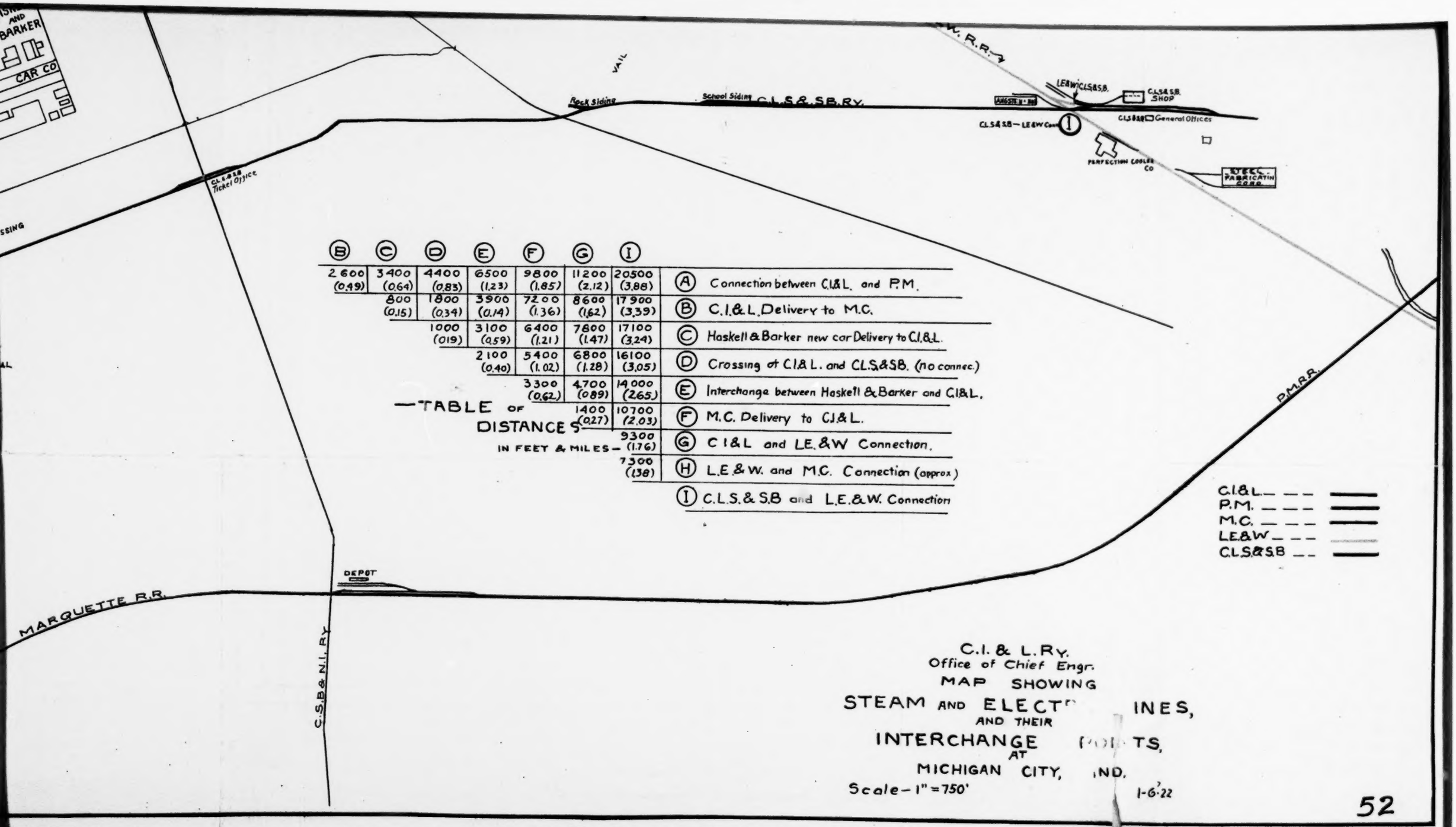
—TABLE OF DISTANCES— IN FEET & MILES

(B)	(C)	(D)	(E)	(F)	(G)	(I)	
2600 (0.49)	3400 (0.64)	4400 (0.83)	6500 (1.23)	9800 (1.85)	11200 (2.12)	20500 (3.88)	(A) Connection between C.I.&L. and P.M.
	800 (0.15)	1800 (0.34)	3900 (0.74)	7200 (1.36)	8600 (1.62)	17900 (3.39)	(B) C.I.&L. Delivery to M.C.
		1000 (0.19)	3100 (0.59)	6400 (1.21)	7800 (1.47)	17100 (3.24)	(C) Haskell & Barker new car Delivery to C.I.
			2100 (0.40)	5400 (1.02)	6800 (1.28)	16100 (3.05)	(D) Crossing of C.I.&L. and C.L.S.&S.B.
				3300 (0.62)	4700 (0.89)	14000 (2.65)	(E) Interchange between Haskell & Barker
					1400 (0.27)	10700 (2.03)	(F) M.C. Delivery to C.I.&L.
						9300 (1.76)	(G) C.I.&L. and L.E.&W. Connection
						7900 (1.38)	(H) L.E.&W. and M.C. Connection
							(I) C.L.S.&S.B. and L.E.&W. Conn

STEAM

INTE

Scale-



—TABLE OF DISTANCES—
IN FEET & MILES

(B)	(C)	(D)	(E)	(F)	(G)	(I)	
2600 (0.49)	3400 (0.64)	4400 (0.83)	6500 (1.23)	9800 (1.85)	11200 (2.12)	20500 (3.88)	(A) Connection between C.I.&L. and P.M.
	800 (0.15)	1800 (0.34)	3900 (0.14)	7200 (1.36)	8600 (1.62)	17900 (3.39)	(B) C.I.&L. Delivery to M.C.
		1000 (019)	3100 (0.59)	6400 (1.21)	7800 (1.47)	17100 (3.24)	(C) Haskell & Barker new car Delivery to C.I.&L.
			2100 (0.40)	5400 (1.02)	6800 (1.28)	16100 (3.05)	(D) Crossing of C.I.&L. and C.L.S.&S.B. (no connec.)
				3300 (0.62)	4700 (089)	14000 (265)	(E) Interchange between Haskell & Barker and C.I.&L.
					1400 (027)	10700 (2.03)	(F) M.C. Delivery to C.I.&L.
						9300 (1.76)	(G) C.I.&L. and LE.&W. Connection.
						7300 (138)	(H) L.E.&W. and M.C. Connection (approx.)
							(I) C.L.S.&S.B. and L.E.&W. Connection

C.I.&L. — — —
P.M. — — —
M.C. — — —
LE&W — — —
C.L.S.&S.B — —

C.I. & L. Ry.
Office of Chief Engr.

MAP SHOWING
STEAM AND ELECTRIC LINES,
AND THEIR
INTERCHANGE POINTS,
AT
MICHIGAN CITY, IND.

Scale—1" = 750'

1-6-22

[fols. 53 & 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROOF OF NOTICE OF HEARING ON APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed June 30, 1924

STATE OF INDIANA,
County of Marion, ss:

William L. Taylor being first duly sworn, according to law, deposes and says: that on June 24, 1924 he mailed by registered mail, postage prepaid, a copy of the petition filed in the Clerk's Office of the United States District Court at Indianapolis in the above entitled cause, to the Honorable George B. McGinty, as Secretary of the Interstate Commerce Commission at Washington, D. C.

That enclosed with said petition and at the same time, affiant mailed a notice to said Secretary of the Interstate Commerce Commission notifying him that on July 3rd, 1924, the petitioner in the above entitled cause will apply for an interlocutory injunction therein, copy of which notice is attached hereto and made a part hereof as "Exhibit A."

Affiant also attaches hereto and makes part hereof as "Exhibit B" the receipt of the said Secretary of the Interstate Commerce Commission for said copy of said petition and notice so mailed to him as aforesaid.

Affiant further deposes and says that on June 24, 1924 he mailed by registered mail, postage prepaid, a copy of the petition filed in the Clerk's Office of the United States District Court at Indianapolis in the above entitled cause, to the Honorable Harlan F. Stone, Attorney General of the United States of America.

That enclosed with said petition and at the same time, affiant mailed a notice to said Attorney General of the United States of America notifying him that on July 3rd, 1924, the petitioner in the above entitled cause will apply for an interlocutory injunction therein, copy of which notice is attached hereto and made a part hereof as "Exhibit A."

Affiant also attaches hereto and makes part hereof as "Exhibit C" the receipt of said Attorney General of the United States for said copy of said petition and notice so mailed him as aforesaid.

Further affiant saith not.

William L. Taylor.

[fol. 55] Subscribed and sworn to before me, a Notary Public in and for said County and State this 30 day of June, 1924. Doris Langdon, Notary Public Marion County Indiana. My Commission expires August 25th, 1926. (Seal.)

[fol. 56] [Title omitted]

EXHIBIT A TO PROOF

Notice

To the Interstate Commerce Commission and the Honorable Harlan F. Stone, Attorney General of the United States, Washington, D. C.:

Please take notice that on the 3rd day of July, 1924 at ten o'clock A. M. on said day, or as soon thereafter as counsel can be heard, we shall appear before the Honorable Albert B. Anderson and two other judges, in the United States District Court Room in the Federal Building at Indianapolis, Indiana, in the above entitled cause, and make application for an interlocutory injunction in said cause to suspend and restrain the enforcement, operation and execution of the order of the Interstate Commerce Commission made and entered in the case of "The Chicago, Lake Shore & South Bend Railway Company, Complainant, vs. Lake Erie & Western Railroad Company, et al., Defendants" I. C. C. Docket No. 13205, when and where you may be present if you see fit.

A copy of the petition in the above entitled cause is enclosed herewith.

William L. Taylor, L. P. Day, C. C. Hine, Solicitors for Petitioners.

[fol. 57] Post Office Department, Official Business.
Penalty for private use to avoid payment of Postage $800.
Registered article No. 13920.
Insured parcel No. —.
Return to W. L. Taylor (name of sender).
Street and number or Post Office box: 622 State Life Bldg., Indianapolis, Indiana.

Post Office Department, Official Business.
Penalty for private use to avoid payment of Postage $800.
Registered article No. 13920.
Insured article No. —.
Return to W. L. Taylor (name of sender).
Street and number or Post Office box: 622 State Life Bldg., Indianapolis, Indiana.

[fols. 58 & 59] EXHIBIT B TO PROOF

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

G. B. McGinty, I. C. C. (signature or name of addressee).
J. Messing (signature of addressee's agent).

Date of Delivery: 6/26, 1924.
Form 3811.

EXHIBIT C TO PROOF

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

Hon. H. F. Stone (Signature or name of addressee), per M. T. Ahern (signature of addressee's agent).

Date of delivery: June 26, 1924.
Form 3811.

[fol. 60] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF INTERVENTION OF THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY

Now comes your petitioner, The Chicago, Lake Shore & South Bend Railway Company, a corporation organized and existing under the laws of the State of Indiana, and respectfully represents to this honorable court that it has an interest in the matters involved in this suit and desires to intervene and be made a party respondent to said suit, and to file an answer to the petition filed by the petitioners herein, and says:

First. That under the provisions of the District Court Jurisdiction Act of October 22, 1913, relating to suits to suspend or set aside any order of the Interstate Commerce Commission, it is provided that:

"The procedure in the District Courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court."

Section 5 of the Commerce Court Act in referring to the procedure in cases involving the validity of orders of the Interstate Commerce Commission has the following proviso:

"Provided, that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order of requirement is made, may appear as parties thereto to their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the Court wherein is pending such suit may make all [fol. 61] such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits;" * * *

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

Second. That your petitioner is, and at all times hereinafter mentioned has been, a corporation organized and existing under the laws of the State of Indiana, with its principal office at Michigan City, Indiana, operating by electricity a line of railroad extending from South Bend, Indiana, to Kensington in the City of Chicago, Illinois, and passing through Michigan City, and is and throughout such period has been a common carrier engaged in the general transportation of passengers and property between points in said states and points in other states of the United States, and as such is and has been subject to the provisions of the Interstate Commerce Act:

Third. That your petitioner was the complainant in the proceeding before the Interstate Commerce Commission commenced October 7, 1921, No. 13205, in which the order dated April 2, 1924, herein complained of was entered; and that your petitioner was throughout its entire course an active party to said proceeding before said Interstate Commerce Commission; and

Fourth. That in said proceeding before said Interstate Commerce Commission your petitioner introduced evidence, and by its attorneys produced, examined and cross-examined witnesses, and was heard in argument and upon brief in all the matters involved in said proceeding, and furthermore, is by the very nature of said proceeding interested in the sustaining and enforcement of the Commission's order above referred to;

Wherefore, your petitioner prays for an order granting your petitioner leave to intervene and making it a party respondent herein in all respects, with the same rights and privileges as if your petitioner had been made a party respondent by petitioners' original [fol. 62] petition herein and permitting it to file an answer as such respondent herein, and for a further order that in all future proceedings in this cause your petitioner shall be considered as a proper party respondent in this cause as fully as if it had been named as such respondent in the original petition herein, and shall be entitled to notice in all matters where notice is required, and its name as such respondent shall hereafter be used in the entitling of all pleadings and orders herein.

Clarence W. Nichols, E. A. Ballard, Butler, Lamb, Foster & Pope, Solicitors for Intervening Petitioner. Allan J. Carter, James Dale Thorn, E. S. Ballard, of Counsel.

[fol. 63] IN UNITED STATES DISTRICT COURT

ORDER GRANTING CHICAGO, LAKE SHORE & SOUTH BEND RY. CO. LEAVE TO INTERVENE—July 8, 1924

It is hereby ordered, that the Chicago, Lake Shore & South Bend Railway Company, intervening petitioner, have leave to intervene as a respondent in this suit, and such leave is hereby granted, and said intervening petitioner is hereby made a party respondent with the same rights and privileges as if made a party respondent by the petitioners' original petition herein, and is hereby given leave to file an answer as such respondent: and

It is further ordered, that in all future proceedings in this cause said Chicago, Lake Shore & South Bend Railway Company shall be considered as a proper party respondent in this cause as fully as if it had been named in the original petition herein, and shall be entitled to notice in all matters where notice is required, and its name as such respondent shall hereafter be used in the entitling of all pleadings and orders herein.

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENING RESPONDENT, THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY, TO PETITION HEREIN

Now comes The Chicago, Lake Shore & South Bend Railway Company, intervening respondent, having been given leave to intervene and to be joined as a party respondent and to file an answer herein, by leave of court first had and obtained, and for answer to the petition herein, or unto so much or such parts thereof as this respondent is advised it is necessary or material for this respondent to make answer unto, answering says:

[fol. 65] I

Answering paragraph I of the petition:

This respondent admits the allegations contained in said paragraph and avers that the Michigan Central and the New York, Chicago & St. Louis Railroad Companies are each common carriers engaged in interstate commerce and that all four of the carriers named in said paragraph are subject to the provisions of the Interstate Commerce Act.

II

Answering paragraph II of the petition:

This respondent admits the allegations contained in said paragraph and further avers that this respondent is a common carrier

engaged in the general transportation of passengers and property in interstate commerce over the line of railroad in said paragraph referred to and as such is and at all times mentioned in the petition has been subject to the Interstate Commerce Act.

III

Answering paragraph III of the petition:

This respondent admits the allegations contained in the said paragraph.

Further answering said paragraph this respondent avers that on or about December 27, 1921, Michigan City Chamber of Commerce and Manufacturers Club of Michigan City filed a joint petition of intervention with the Interstate Commerce Commission in the said proceeding, copy of which is hereto attached and made a part hereof as Exhibit A, alleging that the said Chamber of Commerce has a [fol. 66] membership of upwards of 500 individuals, firms and corporations who are engaged in business in Michigan City and that the said Manufacturers Club has a membership, among others, of 17 individuals, firms and corporations engaged in manufacture or the production of raw materials for manufacture at Michigan City; that the places of business of many of the members of said Chamber of Commerce and said Manufacturers Club are located at Michigan City on the lines of petitioners herein or of this respondent, where they ship and receive large quantities of freight in interstate commerce; that there are in effect between Michigan City and points throughout the United States through routes and joint or combination through rates via the several lines of petitioners herein and this respondent and their connections and that in order that shippers and receivers of freight at Michigan City may have the full benefit of transportation service via all of the said routes it is essential that they be open and available on equal terms to all such shippers and receivers, whether located on the line of one of the petitioners herein or of this respondent; and that by reason of the facts alleged public convenience and necessity would be served and the welfare and prosperity of the members of said petitioners would be promoted if the relief sought in said complaint were granted.

Further answering this respondent avers that on December 29, 1921, the Commission made an order permitting the intervention of said Chamber of Commerce and said Manufacturers Club and making them parties to the said proceeding.

[fol. 67] IV

Answering paragraph IV of the petition:

This respondent admits the allegations of said paragraph describing the allegations contained in this respondent's complaint filed with the Interstate Commerce Commission, attached to the petition herein as Exhibit A. This respondent further avers that in addition to the violation of Section 3 of the Interstate Commerce Act charged

by said complaint this respondent also charged a violation of Section 2 of the said act as set forth in paragraphs IX, X and XI of the said complaint.

V

Answering paragraph V of the petition:

This respondent admits the allegations of said paragraph and further avers that said complaint prayed that such other and further order or orders be made as the Commission might consider proper in the premises.

VI

Answering paragraph VI of the petition:

This respondent admits the allegations of the said paragraph.

VII

Answering paragraph VII of the petition:

This respondent admits the allegations of the said paragraph and further avers that at the said hearing testimony was likewise taken on behalf of interveners, Michigan City Chamber of Commerce and Manufacturers Club of Michigan City.

[fol. 68]

VIII

Answering paragraph VIII of the petition:

This respondent admits the allegations of the said paragraph and further avers that following the close of the hearings in the said proceeding before the Examiner of the Interstate Commerce Commission the said Examiner prepared and, on or about July 24, 1922, served on the parties thereto, in accordance with the rules of practice of the said Commission, a proposed report containing his findings of fact and conclusions of law with respect to the issues in the said proceeding; and that the ultimate finding and conclusion of the said Examiner as contained in the said proposed report was as follows:

"The Commission should find that the refusal of defendants to switch carload traffic in connection with the complainant at Michigan City, Ind., while switching carload traffic for each other at that point, and the failure and refusal of the defendants to enter into reciprocal switching arrangements on carload traffic with the complainant on the same terms and conditions as they enter into such arrangements with each other at Michigan City, are unjustly discriminatory and unduly prejudicial to complainant, the shippers on its line and the shippers located on defendants' lines. The undue prejudice should be removed."

That thereafter on or about August 28, 1922, petitioners filed exceptions to the said proposed report and brief in support thereof and

on or about September 15, 1922, this respondent filed a reply to defendants' said exceptions and brief.

IX

Answering paragraph IX of the petition:

This respondent admits the allegations of the said paragraph.

[fol. 69] X

Answering paragraph X of the petition:

This respondent admits the allegations of the said paragraph and further avers than on or about June 16, 1924, this respondent filed a reply to said petition for reargument before the full Commission.

XI

Answering paragraph XI of the petition:

This respondent admits that the map referred to in said paragraph and attached to the petition as Exhibit D is substantially correct, but avers that some inaccuracies appear on said map, as shown by this respondent's Exhibit B, hereto attached and made a part hereof which shows in addition to the information shown on petitioners' said Exhibit D the location of industries served by petitioners and this respondent at Michigan City.

XII

Answering paragraph XII of the petition:

This respondent denies the allegations of said paragraph as therein phrased and avers that the order of the Interstate Commerce Commission requires petitioners solely to cease and desist from the unjust discrimination and undue prejudice resulting from their refusal to switch interstate carload traffic moving over this respondent's line to or from Michigan City while contemporaneously switching interstate carload traffic for each other at that point, and from their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with this respondent at Michigan City upon relatively [fol. 70] reasonable terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at said point.

This respondent further avers that in paragraph VI of its complaint filed with the Interstate Commerce Commission it alleged that petitioners refused to interchange traffic with it and to enter into reciprocal switching arrangements with it to the same extent and on the same terms and conditions as they do with one another; that the Commission found in its report that the petitioners switch prac-

tically all traffic for one another at Michigan City and that the contemporaneous refusal to do so for this respondent constituted a denial of reasonable, proper and equal facilities for the interchange of traffic; that the Commission further found that the said practice and the failure and refusal of the petitioners to enter into arrangements for the performance of reciprocal switching with this respondent upon relatively reasonable terms while contemporaneously participating in such arrangements with each other at that point subjects this respondent and its shippers to unjust discrimination and undue prejudice.

This respondent further avers that the order of the Commission herein is responsive to the said findings and is according to its terms and in law in the alternative and that petitioners are not required to interchange traffic with this respondent or to enter into reciprocal switching arrangements with it but petitioners are merely required to extend to this respondent the same treatment in respect of the interchange of traffic and reciprocal switching arrangements as they contemporaneously extend to one another; and that the order of the Commission could be as well complied with by the withdrawal of [fol. 71] the interchange and reciprocal switching arrangements among the petitioners as by the establishment of arrangements for interchange and reciprocal switching with this respondent.

This respondent further avers that there is a public interest in interchange and reciprocal switching arrangements between this respondent and petitioners at Michigan City and that public convenience and necessity will be served by the establishment of such arrangements, as shown by the evidence before the Interstate Commerce Commission of witnesses Forbes, Greenebaum, Cox, Phillips, Rice, Thorne, Keppen, Kramer, Kreuger, Qualey, Bisbee, Mathias and Chinske; but this respondent avers that the test of its rights and the rights of its shippers to the relief granted by the Interstate Commerce Commission is not public convenience and necessity or public interest in interchange and reciprocal switching arrangements between this respondent and petitioners; and that petitioners' discussion in their petition of that issue is therefore wholly irrelevant and immaterial in this case.

Answering petitioners' averment that the discontinuance of all reciprocal switching and interchange of traffic among themselves would be contrary to and against the public interest and that there is a public necessity for such reciprocal switching and interchange of traffic, this respondent avers that the existing reciprocal switching and interchange of traffic among petitioners are wholly voluntary; that there has never been any determination by the Interstate Commerce Commerce or any other body charged with the determination of such matters that any such public convenience or necessity exists; and that if petitioners should now elect to comply with the order of the Commission herein by discontinuing such arrangements [fol. 72] they would be entirely free so to do. This respondent further avers that the alleged public interest and public necessity in petitioner's reciprocal switching arrangements among themselves is irrelevant and immaterial in this case.

XIII

Answering paragraph XIII of the petition:

This respondent admits the allegations of the said paragraph and further avers that its own terminal facilities at Michigan City are entirely adequate to handle all traffic likely to offer under reciprocal switching arrangements between this respondent and petitioners. This respondent further avers that the size and extent of the terminal facilities, the number of cars and amount of equipment possessed respectively by this respondent and the several petitioners are wholly immaterial to the issues in this case; and the relative volume of traffic which would move to and from this respondent's terminals and to and from the respective terminals of petitioners, under reciprocal switching arrangements between this respondent and petitioners, is likewise wholly immaterial.

XIV

Answering paragraph XIV of the petition:

This respondent denies the allegations of the said paragraph and avers that the finding of the Commission with respect to the adequacy of petitioner's service was merely that the said service "has, on the whole, been satisfactory during the past year," and "that the steam roads were serving their industries adequately at the time of the hearing." Further answering said paragraph this respondent avers [fol. 73] that much evidence was introduced in its behalf before the Commission tending to show that at various times in the past the business of industries on petitioners' lines at Michigan City has been handled inadequately and improperly and petitioners' service has been unsatisfactory, to wit, the testimony of the witnesses Forbes, Kramer, Qualey, Bisbee, Mathias and Chinske. This respondent further avers that if the language of the report of the Commission can properly be construed as meaning that the business of industries on petitioners' lines is and always has been adequately and properly handled (which this respondent denies) nevertheless such fact is wholly irrelevant and immaterial in this case.

XV

Answering paragraph XV of the petition:

This respondent denies the allegations of the said paragraph as therein phrased and alleges that while the business originated by petitioners at Michigan City would be available to this respondent under its tariffs and those of petitioners, if petitioners were required to enter into reciprocal switching arrangements with it, the amount of such business which this respondent could so obtain is entirely speculative and would depend upon the election of the shippers controlling such business with respect to the routing of the same and the relative dispatch, safety and regularity of the service afforded by this respondent and petitioners respectively.

Further answering said paragraph this respondent avers that the evidence in the record shows that the shippers located on this respondent's line in Michigan City have both inbound and outbound [fol. 74] traffic which, under reciprocal switching arrangements with petitioners, would move by way of petitioners' lines and give to them line-haul traffic and line-haul earnings which they could not otherwise enjoy; and that such facts plainly appear from the testimony before the Commission of Phillips, Rice and Keppen and also from the substantial movement which has taken place between this respondent's industries and the line of the New York, Chicago & St. Louis since the order of the Commission in Chicago Lake Shore and South Bend Railway Company v. Director General, 58 I. C. C. 647, as shown in Complainant's Exhibit No. 7 in the record before the Commission.

This respondent further avers that, as set forth in paragraph XII hereof, there is a public necessity requiring petitioners to enter into reciprocal switching arrangements with this respondent at Michigan City, but even if there were no such public necessity, the lack of proof thereof would be wholly immaterial in this case in view of the fact that unjust discrimination and undue prejudice have been clearly shown to exist and have been found as a fact by the Commission.

XVI

Answering paragraph XVI of the petition:

This respondent denies the allegations of the said paragraph and avers that it filed its complaint before the Interstate Commerce Commission for the principal purpose of compelling petitioners to cease and desist from unjustly discriminating against the shippers on this respondent's line in violation of section 2 of the Interstate Commerce Act and from subjecting this respondent and the shippers on its line to unjust discrimination and undue prejudice in violation of paragraphs (1) and (3) of section 3 of the said act. This respondent [fol. 75] further avers that whatever motives it may have had in instituting the said proceeding before the Commission are wholly irrelevant and immaterial in this case.

XVII

Answering paragraph XVII of the petition:

This respondent denies the allegations of the said paragraph to the effect that the order of the Interstate Commerce Commission is not sustained or supported by the report and findings of fact of said Commission and is therefore unlawful and void for the alleged reasons stated in the said paragraph or for any other reasons whatsoever and avers on the contrary that said order is completely sustained and supported by the Commission's report and findings of fact and is in all respects lawful and valid.

Answering the allegations of subdivision (a) of said paragraph, this respondent denies said allegations as therein phrased and avers that, as heretofore in paragraph XII of this answer set forth, there is a public necessity for interchange of traffic and reciprocal switching arrangements between this respondent and petitioners at Michigan City, but denies that the question of public necessity or the absence thereof has any bearing upon or is in any respect whatsoever relevant or material to the issues in this case. Respondent further avers that the order of the Interstate Commerce Commission herein does not require petitioners to enter into arrangements with this respondent but on the contrary merely requires petitioners to cease and desist from the unjust discrimination and undue prejudice found by the Commission to exist and that the said order is not in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 76] Answering the allegations of subdivision (b) of said paragraph, this respondent denies the allegations therein contained and avers on the contrary that the report and findings of fact of the Commission show that the circumstances and conditions under which petitioners perform reciprocal switching and interchange traffic with one another are substantially similar to those under which reciprocal switching and interchange of traffic between petitioners and this respondent would be performed; and that in view of such similarity the difference in treatment accorded by petitioners to one another and to this respondent constitutes unlawful discrimination.

Answering the allegations of subdivision (c) of said paragraph, this respondent denies the allegations therein contained and avers on the contrary that the order of the Commission is no broader than its report and findings of fact but is responsive to the said report and findings; that petitioners now interchange cars with one another and perform reciprocal switching for one another regardless of the destination or origin of said cars in spite of the fact that petitioners and each of them have lines of railroad between Michigan City and Chicago, Illinois, and compete with one another in the transportation of traffic between said points in exactly the same manner as petitioners and each of them compete with this respondent; and by reason of the said fact and by reason further of the petitioners having declined to enter into such arrangements with this respondent, they and each of them have been and are guilty of unjust discrimination and undue prejudice against this respondent as well as against the industries located on this respondent's line, which unjust discrimination and undue prejudice can be removed only in the manner required by the order of the Commission, that is to say, either by the petitioners discontinuing the interchange of cars and the performance of recip-

[fol. 77] rocal switching with one another or by their according such arrangements to this respondent on relatively reasonable terms.

XVIII

Answering paragraph XVIII of the petition:

This petitioner denies the allegations of the said paragraph to the effect that the order of the Commission is not based on any substantial

evidence which supports and justifies it for any of the alleged reasons recited in the said paragraph or for any other reasons whatsoever and avers on the contrary that said order is based in all particulars on substantial evidence which fully and completely supports and justifies it.

Answering the allegations of subdivision (a) of said paragraph, this respondent denies the allegations contained therein and avers that the evidence introduced before the Commission shows conclusively that both this respondent and the shippers on its line at Michigan City as well as the shippers on petitioners' lines at Michigan City are subjected to undue and unlawful discrimination, prejudice and disadvantage by reason of the fact that petitioners interchange cars with one another and have reciprocal switching arrangements with one another at Michigan City and contemporaneously deny like treatment to this respondent.

Answering the allegations of subdivision (b) of the said paragraph, this respondent denies the allegations contained therein and avers, as heretofore in paragraph XII of this answer set forth, that abundant evidence was introduced before the Commission showing public necessity for reciprocal switching arrangements and interchange of traffic between this respondent and petitioners. Further answering, this respondent denies that the order of the Commission requires [fol. 78] petitioners to enter into reciprocal switching arrangements or to interchange traffic with this respondent and denies that the said order will require petitioners to give this respondent the use of their terminal facilities at Michigan City. Respondent further denies that the proceeding before the Commission was brought under paragraph (4) of section 3 of the Interstate Commerce Act; and denies that the question of public interest in reciprocal switching arrangements and interchange of traffic between petitioners and this respondent is in any respect whatsoever relevant or material in this case.

Answering the allegations of subdivision (c) of the said paragraph, this respondent denies the allegations contained therein and avers that the order of the Commission does not require the establishment of reciprocal switching or the interchange of cars between petitioners and this respondent and that the said order will not result in the establishment of through routes and rates, inasmuch as the said order is according to its terms and in law in the alternative, as hereinbefore set forth in paragraph XII of this answer, and inasmuch further as interchange of traffic and reciprocal switching are not, either in form or in legal effect, the equivalent of through routes and joint rates. And this respondent further avers that while the question of public interest is wholly irrelevant and immaterial to the issues herein, nevertheless the evidence introduced before the Commission fully establishes that reciprocal switching arrangements and interchange of cars between this respondent and petitioners are necessary and desirable in the public interest, as hereinbefore shown in paragraph XII of this answer.

Answering the allegations of subdivision (d) of said paragraph, this respondent denies the allegations contained therein and avers,

as hereinbefore shown in paragraph XII of this answer, that the [fol. 79] evidence introduced before the Commission affirmatively shows that public convenience and necessity require the interchange of traffic and reciprocal arrangements between petitioners and this respondent, but respondent further avers that the said fact is irrelevant and immaterial in this case.

Answering the allegations of subdivision (e) of said paragraph, this respondent denies the allegations contained therein and avers that the evidence introduced at the hearing before the Commission affirmatively shows that there is undue and unlawful discrimination and prejudice against this respondent and its shippers; that the circumstances and conditions surrounding reciprocal switching and interchange of traffic among petitioners are substantially similar to those surrounding such switching and interchange between petitioners and this respondent; that this respondent is in competition with petitioners for traffic in like manner as petitioners are in competition among themselves for traffic; and that the industries on this respondent's line at Michigan City are in competition with industries on petitioners' lines at Michigan City.

Answering the allegations of subdivision (f) of the said paragraph, this respondent denies the allegations contained therein and avers that its principal purpose in bringing the said proceeding before the Commission was to compel petitioners to cease and desist from the unlawful discrimination and undue prejudice to which they were and are subjecting this respondent and its shippers; and this respondent further avers that at various times in the past the business of shippers on petitioners' lines at Michigan City has been handled inadequately and unsatisfactorily by petitioners and that this respondent could in many cases handle the said business more adequately and satisfactorily than petitioners, and that the evidence [fol. 80] offered at the hearing before the Commission so shows.

Answering the allegations of subdivision (g) of the said paragraph, this respondent denies the allegations contained therein and avers on the contrary that the evidence introduced at the hearing before the Commission shows conclusively, and the Commission finds, that the circumstances and conditions under which petitioners perform reciprocal switching and interchange traffic with one another at Michigan City are substantially similar to those under which they would perform reciprocal switching and interchange traffic with this respondent. This respondent denies that the order herein requires petitioners to enter into reciprocal switching and interchange traffic with it, inasmuch as the said order is by its terms and in law in the alternative, as hereinbefore shown in paragraph XII of this answer.

XIX

Answering paragraph XIX of the petition:

This respondent denies the allegations of the said paragraph to the effect that the report and conclusion of the Commission that this respondent and its shippers are subjected to unjust discrimination

and undue prejudice is not sustained nor supported by the evidence and is not based on any substantial or sufficient evidence for the reasons therein set forth or for any other reasons whatsoever, and avers on the contrary that the said report and conclusion are fully sustained and supported by the evidence in that the evidence conclusively shows (and it was so found by the Commission) that two of the industries located on this respondent's line at Michigan City compete with industries located on the lines of petitioners at the said point.

[fol. 81] XX

Answering paragraph XX of the petition:

This respondent denies the allegations of the said paragraph and avers that neither public interest and necessity nor the obligation of establishing necessary through routes and rates prevents petitioners from ceasing and desisting from the interchange of traffic and from reciprocal switching arrangements among themselves, inasmuch as reciprocal switching is not either in practical effect or in legal contemplation equivalent to the establishment of through routes and joint rates; that petitioners are not and never have been required by order of the Interstate Commerce Commission, or by any other lawful order, to interchange traffic and enter into reciprocal switching arrangements with one another at Michigan City; that neither the Interstate Commerce Commission nor any other body has ever found that such arrangements are in the public interest; and that petitioners are entirely free to comply with the order herein by discontinuing the interchange of traffic and reciprocal switching among themselves at Michigan City irrespective of public interest and necessity. This respondent further avers that the evidence introduced at the hearing before the Commission shows that public convenience and necessity and public interest would be served if petitioners complied with the alternative of the order requiring them to enter into interchange and switching arrangements with this respondent as heretofore shown in paragraph XII of this answer.

[fol. 82] XXI

Answering paragraph XXI of the petition:

This respondent denies the allegations of the said paragraph and avers on the contrary that the Interstate Commerce Act confers upon the Commission full authority to make the order referred to and that the same is within the power of the Commission under the said act and lawful and constitutional.

XXII

Answering paragraph XXII of the petition:

This respondent denies the allegations in said paragraph to the effect that the order of the Commission is arbitrary and illegal and

in violation of the provisions of the Fifth Amendment to the Constitution of the United States for the reasons therein set forth or for any other reasons whatsoever.

Further answering said paragraph this respondent avers that while, as heretofore shown in paragraph XII of this answer, there is a public interest in and public necessity for the interchange of cars and reciprocal switching between this respondent and petitioners, nevertheless such public interest and necessity are wholly irrelevant and immaterial in this case and the true ground for the order herein made, as found by the Commission, is that the circumstances and conditions surrounding the interchange of traffic and reciprocal switching among petitioners are substantially similar to those surrounding the interchange of traffic and reciprocal switching between this respondent and petitioners. Among the said circumstances is the fact, as shown by the evidence of record before the Commission, that petitioners compete with one another and likewise with respondent [fol. 83] for line-haul traffic to and from Michigan City, so that any diversion of traffic which resulted from petitioners' interchanging traffic and entering into reciprocal switching arrangements with this respondent would be similar to that already brought about by their voluntary acts in entering into such arrangements among themselves.

Further answering said paragraph, this respondent denies that cancellation by petitioners of the interchange and reciprocal switching arrangements among themselves under the Commission's order would be unlawful and avers on the contrary that under said order petitioners are free at any time to effect such cancellation if they so elect; and further avers that there has never been any finding or determination by the Interstate Commerce Commission or otherwise that the existing arrangements among petitioners for the interchange of traffic and reciprocal switching are necesary in the public interest and that even if such public interest does in fact exist the same is irrelevant and immaterial in this case.

XXIII

Answering paragraph XXIII of the petition:

This respondent denies the allegations of the said paragraph except the allegation that the line of railroad of the petitioner Michigan Central Railroad closely parallels this respondent's line from Michigan City to Kensington, Illinois, which allegation this respondent admits. Further answering the said paragraph, this respondent avers that the line of petitioner Pere Marquette Railway closely parallels both the line of the Michigan Central Railroad and the line of this respondent from Michigan City to Chicage, and that the respective lines of petitioners, Chicago, Indianapolis & Louisville Railway and New York, Chicago & St. Louis Railroad [fol. 84] run from Michigan City to Chicago. Petitioner further avers that by reason of the said facts petitioners and this respondent are in competition for traffic between Michigan City and Chicago and

between Michigan City and points reached via Chicago; that this respondent has a substantial amount of business at Michigan City both inbound and outbound upon which petitioners can obtain a line haul under interchange and reciprocal switching arrangements with respondent; and that this respondent is not seeking in this proceeding to obtain the use of petitioners' terminal facilities at Michigan City but is seeking the same treatment from petitioners in the matter of interchange of traffic and reciprocal switching arrangements as they accord to one another under substantially similar circumstances and conditions. This respondent further avers that at various times in the past industries located on the lines of petitioners in Michigan City have been inadequately and improperly served by petitioners, as shown by the evidence offered at the hearing before the Commission, particularly the testimony of Forbes, Kramer, Qualey, Bisbee, Mathias and Chinske

XXIV

Answering paragraph XXIV of the petition:

This respondent denies the allegations of the said paragraph and alleges that the evidence introduced at the hearing before the Commission showed, and the Commission specifically found in its report herein, that this respondent is a common carrier engaged in the general transportation of freight within the meaning of the Interstate Commerce Act. This respondent further avers that the Interstate Commerce Commission likewise specifically so found in the proceeding entitled Indiana Passenger Fares of C. L. S. &
[fol. 85] S. B. Ry. Co. 69 I. C. C. 180, and that in C. L. S. & S. B. Ry. Co. v. Director General, 58 I. C. C. 647, referred to of record before the Commission in this case, the Commission made the following findings with respect to the construction and operation of this respondent's line of railroad (pp. 648-650):

"The line operated by complainant extends between South Bend and Kensington, which is within the corporate limits of the City of Chicago, a distance of approximately 76 miles. It is of standard railroad construction, designed for freight and passenger business, laid in part with 70-pound and in part with 85-pound rails, ballasted with gravel from South Bend to Hammond and with stone and slag beyond. It occupies private rights of way, varying from 50 to 100 feet wide, except for stretches of public highway in the neighborhood of 2 miles each in East Chicago, Michigan City, and South Bend. It crosses overhead the Pennsylvania, Wabash, and Elgin, Joliet & Eastern Railroads at Gary and the Pere Marquette between Michigan City and South Bend. The main line between South Bend and Gary is a single track, equipped with standard automatic block signals, while the remainder is double tracked. All bridges are designed to sustain heavy traffic. Complainant owns the portion of the line which is in Indiana, but between the state line and Kensington operates over the tracks of the Kensington & Eastern

Railroad, which is owned by the Illinois Central Railroad Company. At Kensington complainant connects with the Illinois Central, at Gary with the Elgin, Joliet & Eastern, and at Michigan City with the Lake Erie & Western. It also has certain other connections, for example, with the Pullman Railroad at Kensington and the Chicago & Calumet River Railroad at Hegewisch, both of which are industrial lines, and plans have been consummated for a connection at South Bend with the Indiana Northern Railway, an electric line and subsidiary of the Oliver Chilled Plow Works, having steam line connections at that point. Complainant commenced handling freight in January, 1917, although its line has been in operation some years. [fol. 86] Complainant, whose common carrier status is admitted by the defendants, has not at any time been under federal control. It is a member of the American Railway Association, the Master Car Builders' Association, and the Bureau for the Safe Transportation of Explosives. It operates under the so-called national code of car-demurrage rules, makes monthly and annual reports to us, and complies with our accounting requirements, and is a party to through routes and joint rates with the Illinois Central and Elgin, Joliet & Eastern equal to the rates via competing lines. Its freight motive power comprises two Westinghouse-Baldwin all-steel electric locomotives of 1,500 horsepower each and one composite electric locomotive of 800 horsepower. Its further freight rolling stock consists of 7 steel box cars of 80,000 pounds capacity, 2 wooden box cars of 60,000 pounds capacity, 7 steel gondolas of 100,000 pounds capacity, 15 convertible ballast and gondola cars of 80,000 pounds capacity, and 5 flat cars. The evidence concerning their condition is conflicting, it being represented by complainant that they meet standard requirements, whereas the opposing testimony is that the convertible cars have prohibitive penalty defects and that 3 of the flat cars are not interchangeable. Complainant expresses its readiness to add to its equipment if the desired relief is accorded it. It is testified that approximately 40 per cent of its power-house capacity is in reserve, which is sufficient to handle 400 cars of freight per day and still leave a reasonable protective operating reserve.

At the present time complainant operates daily each way between South Bend and Kensington one freight train of from 15 to 20 cars, mostly foreign equipment. By an exhibit covering the traffic handled by it between January, 1917, and August, 1919, inclusive, aggregating 41,330 tons less than carload and 89,876 tons carload, 41,616 tons are shown as having moved locally, 58,584 tons as having been interchanged with the Illinois Central, and 31,006 tons as having been interchanged with the Elgin, Joliet & Eastern; but as it is explained that interchange traffic which moved on combinations of local rates is included in the local tonnage, the foregoing distribu- [fol. 87] tion evidently is not exact. Complainant employs a traveling freight agent to cover its own line; also a commercial agent at Chicago. It maintains freight agents at Kensington, Hegewisch, Hammond, Calumet, Gary, Michigan City, New Carlisle, and South Bend. The agent at New Carlisle is also agent for the Chicago, South Bend & Northern Indiana, another electric line. It also maintains

freight stations at those points and at Miller, and team tracks at most of them; also a track scale at Calumet. The stations vary from 10 feet by 20 feet to 30 feet by 70 feet in size, the largest being at Michigan City. Complainant is prohibited by city ordinances from transporting live stock through the streets in East Chicago and Hammond, live stock or manure through the streets in Michigan City, and any freight east of La Porte avenue in South Bend, a point apparently just short of the business center of the city.

At Michigan City complainant connects with the Lake Erie & Western only, and it is through that junction that the establishment of through routes and joint rates is sought. The track which links the two main lines, spoken of in the record as the interchange track, is approximately 1,000 feet long, and from it lead two spurs for the storage of cars. The storage capacity approximates 25 cars."

and that at the hearing before the Commission, C. N. Wilcoxon, respondent's then president, testified that there had been no important changes in the construction or operation of its lines since that time, and the Commission so found in its report herein.

Further answering said paragraph this respondent avers that in truth and in fact the sole reason why petitioners have refused voluntarily to enter into arrangements for interchange of traffic and reciprocal switching with this respondent at Michigan City, and the sole reason why petitioners have instituted this suit, is because this respondent's line is operated by electricity instead of by steam.

[fol. 88] XXV

Answering paragraph XXV of the petition:

This respondent denies that the said order of the Interstate Commerce Commission is unlawful and denies that the order will, unless enjoined, set aside, annulled and suspended by this Honorable Court, subject petitioners or any of them to a multiplicity of suits of any of the kinds referred to in said paragraph or of any kind whatsoever or will produce irreparable damage to petitioners.

XXVI

Answering paragraph XXVI of the petition, this respondent denies that if petitioner should be required to comply with the said order pending final adjudication of its lawfulness they would sustain any loss of property or otherwise or any diversion of traffic which they are not lawfully required to sustain under the said order, and denies that the enforcement of the said order would be against the public interest or convenience in any respect whatsoever.

XXVII

Further answering the petition, this respondent avers and shows that it duly filed its complaint in writing with the Interstate Com-

merce Commission against petitioners herein as alleged in the petition; that said complaint charged and alleged that petitioners were subjecting this respondent and its shippers to unjust discrimination [fol. 89] and undue prejudice as hereinbefore alleged in paragraph IV of this answer; that a copy of said complaint was served by the Interstate Commerce Commission upon each petitioner and that the said Commission called upon each petitioner to satisfy the said complaint or to answer the same in writing within 20 days; that thereafter petitioners filed their answers in writing with the said Commission as alleged in the petition; that thereafter, as hereinbefore alleged in paragraph III of this answer, Michigan City Chamber of Commerce and Manufacturers' Club of Michigan City were by order duly made permitted to become parties to the said proceeding; that upon the joining of the issues in said case the same was duly assigned for hearing by the Commission before an Examiner of the Commission and all parties thereto were duly advised by due and timely notice in writing of the time and place of the said hearing; that pursuant to said notice the parties, including the aforementioned interveners, appeared and offered their respective proofs; that thereafter briefs were filed with the Examiner of the Commission, a proposed report was prepared by him and served upon the parties, petitioners filed exceptions thereto and brief in support thereof and this respondent filed a reply to such exceptions and brief; that thereafter oral argument was heard in the case, following which said case was by the respective parties duly submitted to the Commission for determination; that after giving full consideration to all the facts and circumstances connected with the questions presented for decision and shown of record, the Commission was of the opinion that petitioners were guilty of the unjust discrimination and undue prejudice charged in the complaint; that said Commission being of that opinion it became the duty of the Commission to make an order directing peti- [fol. 90] tioners to cease and desist from the unjust discrimination and undue prejudice so found; and that in the performance of its said duty said Commission made the order herein complained of. This respondent further avers that all of the allegations contained in said complaint before the Interstate Commerce Commission relate to matters within the jurisdiction of the said Commission under the Interstate Commerce Act; that the report and order of the Commission relate to the said matters; that the findings of fact made by the Commission and contained in the said report and order relate only to matters within the Commission's jurisdiction; that the said findings are supported by substantial evidence of record before the Commission; and that the correctness of said findings is not open to review.

Further answering said paragraph XXVI this respondent avers and shows that the said order is legal, valid and binding on petitioners and that the enforcement of the said order upon the date when by its terms it becomes effective, July 24, 1924, would not subject petitioners to irreparable injury or any injury whatsoever or result in any loss of property of petitioners.

XXVIII

Further answering the petition, this respondent denies every allegation contained in said petition except such as have been herein specifically admitted, modified or explained.

All of which matters and things this respondent is ready to aver, maintain and prove as this Honorable Court shall direct. And this [fol. 91] respondent prays that the petition herein be dismissed and that this respondent may be allowed its reasonable costs.

Clarence W. Nichols, Ernest S. Ballard, Allan J. Carter, Solicitors for Intervening Respondent. James Dale Thom, Arvid B. Tanner, of Counsel.

[fol. 92] Jurat showing the foregoing was duly sworn to by Leo P. Forbes; omitted in printing.

[fol. 93] EXHIBIT A TO ANSWER

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 13205

THE CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY, Complainant,

vs.

THE LAKE ERIE & WESTERN RAILROAD COMPANY, THE MICHIGAN Central Railroad Company, Pere Marquette Railway Company, and Chicago, Indianapolis & Louisville Railway Company, Defendants.

Intervening Petition of Michigan City Chamber of Commerce and Manufacturers Club of Michigan City

Come now your petitioners, the Michigan City Chamber of Commerce and the Manufacturers Club of Michigan City, and respectfully represent that they have an interest in the matters in litigation in the above entitled proceeding and desire to intervene in and become parties to said proceeding and for grounds of the proposed intervention say:

I

That your petitioner, Michigan City Chamber of Commerce, is a corporation without capital stock, organized and existing under the laws of the State of Indiana, with its principal office at 113 West Seventh Street, Michigan City, Indiana; that the membership of your petitioner includes upwards of 500 individuals, firms and corporations who are engaged in business at Michigan City; that the

[fol. 94] objects of your petitioner are to encourage and advance the best interests, civic, commercial and otherwise, of the City of Michigan City and of the members of your petitioners and to promote trade, industry, and the public welfare.

II

That your petitioner, Manufacturers Club of Michigan City, is a corporation without capital stock, organized and existing under the laws of the State of Indiana, with its principal office at 218 Franklin Street, Michigan City, Indiana; that the membership of your petitioner includes, among others, seventeen individuals, firms and corporations engaged at Michigan City, Indiana, in manufacture or the production of raw materials for manufacture; that among others the objects of your petitioner are to promote the common welfare of persons, firms and corporations of Michigan City engaged in manufacturing or first hand production of materials used in manufacture; to undertake by such means as may be proper and lawful to furnish trade information and to afford service to its members; and to do such other things in the interest of its members and of the trade as may be lawful and proper.

III

That the places of business of many of the members of your petitioners are located at Michigan City on the line or lines of one or more of complainant and defendants herein; and that said members of your petitioners at their said respective places of business ship and receive large quantities of freight in interstate commerce.

[fol. 95] IV

That there are in effect between Michigan City and points throughout the United States through routes and joint or combination through rates via the several lines of complainant and defendants herein and their connections, and that in order that shippers and receivers of freight at Michigan City may have the full benefit of transportation service via all of the said through routes it is essential that they be open and available on equal terms to all such shippers and receivers, whether located on the line of complainant or one of defendants herein, and whether or not the said through routes embrace the line of complainant.

V

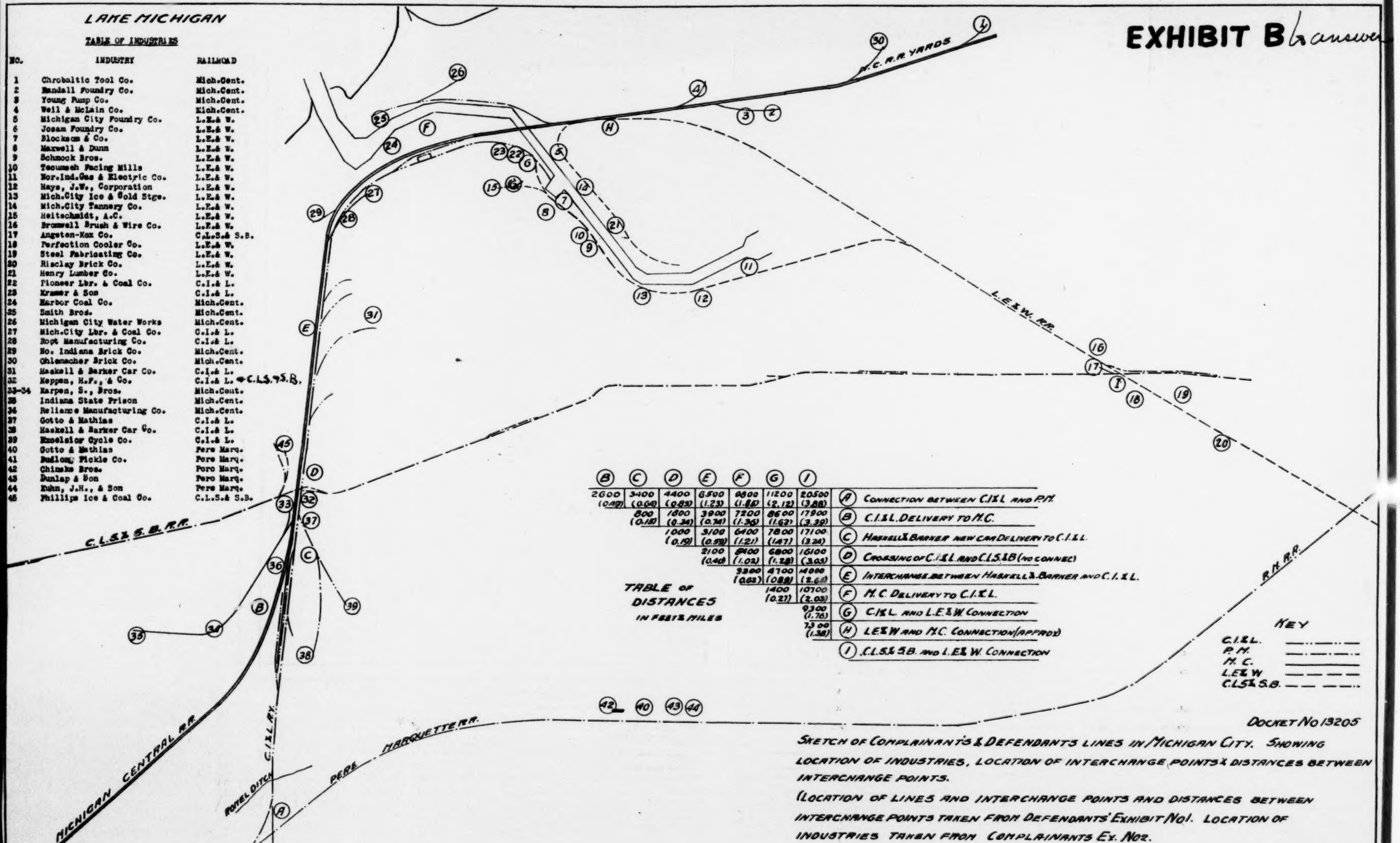
That by reason of the facts hereinbefore alleged public convenience and necessity will be served and the welfare and prosperity of the members of your petitioners and the City of Michigan City will be promoted if each of the defendants herein be required to enter into and perform reciprocal switching arrangements with the complainant at Michigan City upon the same terms and conditions and

EXHIBIT B (answer)

LAKE MICHIGAN

TABLE OF INDUSTRIES

NO.	INDUSTRY	RAILROAD
1	Chrobaltic Tool Co.	Mich.Cent.
2	Randall Foundry Co.	Mich.Cent.
3	Young Pump Co.	Mich.Cent.
4	Weil & McLain Co.	Mich.Cent.
5	Michigan City Foundry Co.	L.E.& W.
6	Josam Foundry Co.	L.E.& W.
7	Blocksom & Co.	L.E.& W.
8	Maxwell & Dunn	L.E.& W.
9	Schmook Bros.	L.E.& W.
10	Tecumseh Pacing Mills	L.E.& W.
11	Mor.Ind.Gas & Electric Co.	L.E.& W.
12	Hays, J.W., Corporation	L.E.& W.
13	Mich.City Ice & Cold Stge.	L.E.& W.
14	Mich.City Tannery Co.	L.E.& W.
15	Heitschmidt, A.C.	L.E.& W.
16	Bromwell Brush & Wire Co.	L.E.& W.
17	Angsten-Kox Co.	C.L.S.& S.B.
18	Perfection Cooler Co.	L.E.& W.
19	Steel Fabricating Co.	L.E.& W.
20	Risclay Brick Co.	L.E.& W.
21	Henry Lumber Co.	L.E.& W.
22	Pioneer Lbr. & Coal Co.	C.I.& L.
23	Kramer & Son	C.I.& L.
24	Harbor Coal Co.	Mich.Cent.
25	Smith Bros.	Mich.Cent.
26	Michigan City Water Works	Mich.Cent.
27	Mich.City Lbr. & Coal Co.	C.I.& L.
28	Root Manufacturing Co.	C.I.& L.
29	No. Indiana Brick Co.	Mich.Cent.
30	Ohlemacher Brick Co.	Mich.Cent.
31	Haskell & Barker Car Co.	C.I.& L.
32	Keppen, H.F., & Co.	C.I.& L. & C.L.S.& S.B.
33-34	Karpen, S., Bros.	Mich.Cent.
35	Indiana State Prison	Mich.Cent.
36	Reliance Manufacturing Co.	Mich.Cent.
37	Gotto & Mathias	C.I.& L.
38	Haskell & Barker Car Co.	C.I.& L.
39	Excelsior Cycle Co.	C.I.& L.
40	Gotto & Mathias	Pere Marq.
41	Dudley Pickle Co.	Pere Marq.
42	Chimske Bros.	Pere Marq.
43	Dunlap & Son	Pere Marq.
44	Kuhn, J.H., & Son	Pere Marq.
45	Phillips Ice & Coal Co.	C.L.S.& S.B.



(B)	(C)	(D)	(E)	(F)	(G)	(I)	
2600 (0.49)	3400 (0.64)	4400 (0.83)	6500 (1.23)	9800 (1.86)	11200 (2.12)	20500 (3.88)	(A) Connection between C.I.& L. and P.M.
	800 (0.15)	1800 (0.34)	3900 (0.74)	7200 (1.36)	8600 (1.62)	17900 (3.39)	(B) C.I.& L. Delivery to M.C.
		1000 (0.19)	3100 (0.59)	6400 (1.21)	7800 (1.47)	17100 (3.24)	(C) Haskell & Barker new car Delivery to C.I.& L.
			2100 (0.40)	5400 (1.02)	6800 (1.28)	16100 (3.05)	(D) Crossing of C.I.& L. and C.L.S.& S.B. (no connec)
				3300 (0.62)	4700 (0.89)	14000 (2.64)	(E) Interchange between Haskell & Barker and C.I.& L.
					1400 (0.27)	10700 (2.03)	(F) M.C. Delivery to C.I.& L.
						9300 (1.76)	(G) C.I.& L. and L.E.& W. Connection
						7300 (1.38)	(H) L.E.& W. and M.C. Connection (approx)
							(I) C.L.S.& S.B. and L.E.& W. Connection

TABLE OF DISTANCES IN FEET & MILES

KEY

C.I.& L. —·—·—·—
P.M. —·—·—·—
M.C. ————
L.E.& W — — — —
C.L.S.& S.B. — — ·—·—

DOCKET NO 13205

SKETCH OF COMPLAINANT'S & DEFENDANTS LINES IN MICHIGAN CITY. SHOWING LOCATION OF INDUSTRIES, LOCATION OF INTERCHANGE POINTS & DISTANCES BETWEEN INTERCHANGE POINTS.

(LOCATION OF LINES AND INTERCHANGE POINTS AND DISTANCES BETWEEN INTERCHANGE POINTS TAKEN FROM DEFENDANTS' EXHIBIT NO1. LOCATION OF INDUSTRIES TAKEN FROM COMPLAINANTS EX. NO2.

to the same extent as with one another, all as prayed in the original and supplemental complaints herein.

VI

That the respective boards of directors of your petitioners, by resolution duly adopted, authorized their respective secretaries to file this petition of intervention and in all respects to support the complaint herein.

Wherefore, said Michigan City Chamber of Commerce and Manu-
[fols. 96 & 97] facturers Club of Michigan City pray leave to intervene and be treated as parties hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses and be heard in person or by counsel upon brief and in oral argument, if oral argument is granted.

Michigan City Chamber of Commerce, by W. K. Greenebaum, Secretary. Manufacturers Club of Michigan City, by Martin S. Karpen, Secretary.

Dated at Michigan City, Indiana, December 19, A. D. 1921.

(Here follows Exhibit B to answer, marked side folio page 98)

[fols. 99-100] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, we hereby enter the appearance of the Interstate Commerce Commission, as a party respondent, and of ourselves as its counsel, in the above-entitled suit.

P. J. Farrell, R. G. Curry for Interstate Commerce Commission.

[fol. 102] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed July 8, 1924

The Interstate Commerce Commission, intervening respondent in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners'

petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering Paragraphs I and II of the petition, said intervening respondent, Interstate Commerce Commission, hereinafter called the Commission, admits for the purposes of this suit that the allegations contained in said paragraphs are true.

[fol. 103]

II

Answering Paragraphs III to V, inclusive, of the petition, the Commission admits that in a proceeding before it, whose docket number is 13205, a complaint and an amended and supplemental complaint were filed as alleged in Paragraph III, which contained allegations and a prayer substantially as alleged in Paragraphs IV and V. In this connection, however, the Commission refers the court to a copy of said amended and supplemental complaint, which is Exhibit "A" to the petition, for more full and complete information in the premises.

III

Answering Paragraphs VI and VII of the petition, the Commission admits that answers to said amended and supplemental complaint were filed as alleged in Paragraph VI, and that a hearing in said proceeding was held as alleged in Paragraph VII.

IV

Answering Paragraph VIII of the petition, the Commission admits that in said proceeding briefs were filed and oral arguments made before the Commission as alleged in said paragraph.

V

Answering Paragraphs IX to XXVI, inclusive, of the petition, the Commission admits and alleges that, in the aforesaid proceeding, it made and entered the report and order dated April 2, 1924, re-
[fol. 104] ferred to in paragraph IX, and the amendatory order of June 21, 1924, mentioned in Paragraph X, and that said order of April 2 is based upon findings of the Commission, contained in said report, which read as follows:

We find that the refusal of defendants to switch interstate carload traffic moving over complainaint's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and the failure and refusal of the defendants to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant upon relatively reasonable terms, based upon a careful consideration of the similarity of service and other conditions in

connection with the service rendered each other at that point, so long as they contemporaneously participate in such arrangements with each other at that point, subjects complainant and its shippers to unjust discrimination and undue prejudice which will be ordered removed. (Pet. p. 48.)

The Commission further admits and alleges that it denied the petition for reargument and for postponement of the effective date of said order of April 2, as alleged in Paragraph X.

The Commission further alleges that, in said proceeding, it accorded to petitioners and other interested parties the full hearing provided for in and by section 15 of the interstate commerce act; that at the hearings in said proceeding a large volume of testimony [fol. 105] and other evidence, bearing upon the matters covered by said order of April 2, was submitted to the Commission for consideration on behalf of the parties to said proceeding by their respective counsel; that at said hearings and subsequently, both orally and in briefs filed as aforesaid, questions relating to said matters were fully argued and submitted to the Commission for determination, on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and entered and served upon the petitioners and other interested parties said report and order of April 2, wherein it set forth its findings and conclusions and its decision, order and requirements in the premises.

The Commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence which was before the Commission in said proceeding.

The Commission further alleges that it considered and weighed carefully, in the light of its own knowledge and experience, each of and all the matters called to its attention by petitioners and other parties who were represented in said proceeding by their respective counsel, including all matters covered by the allegations contained in the petition herein.

The Commission further alleges that said order of April 2 was not made by it either arbitrarily, or unjustly or contrary to the relevant evidence, or without evidence to support it, and that in [fols. 106-108] making said order the Commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner.

The Commission denies that, as alleged in Paragraph XXIV of the petition, it is without jurisdiction over the Chicago, Lake Shore and South Bend Railway Company, and denies that, as alleged in Paragraph XXV of the petition, unless said order of April 2, 1924, is enjoined and set aside, the petitioners will suffer irreparable damage.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said petition, in so far as they conflict either with the allegations herein, or with either the findings or conclusions of fact included in said report

and order of April 2, 1924, copies of which are Exhibit "C" to the petition and are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by P. J. Farrell, Chief Counsel.

Jurat showing the foregoing was duly sworn to by F. I. Cox; omitted in printing.

[fol. 109] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES—Filed July 8, 1924

First Defense

United States for the First Defense to the petition herein against it says:

The petition with the exhibits attached thereto and made a part thereof is without equity on its face and does not state any cause of action against the United States.

Wherefore, respondent moves to dismiss the petition and prays that an appropriate order may be entered.

Second Defense

United States of America, respondent, for the Second Defense to the petition filed herein against it says:

[fol. 110] I, II, III. Respondent admits the allegations of paragraphs I, II and III and each and every part of the same, in manner and form as alleged.

IV, V. Respondent admits the allegations of paragraphs IV and V and each and every part of the same, in manner and form as alleged, with this exception: It denies that those allegations set forth the amended and supplemental complaint filed by The Chicago, Lake Shore & South Bend Railway Company with the Interstate Commerce Commission fully and completely and alleges that the allegations contain but an abstract thereof. For greater certainty respondent refers to the amended and supplemental complaint in its entirety as the same constitutes a part of the record of the evidence and proceedings before the Commission.

VI. Respondent admits that the petitioners filed their respective answers before the Commission to the amended and supplemental complaint and, subject to verification for accuracy, respondent admits that copies of such answers are attached to the petition as Exhibit "B-1," etc.

VII, VIII, IX. Respondent admits the allegations of paragraphs VII, VIII and IX with this exception: Respondent has no knowledge that the report and order were not served on the petitioners until on or about May 6, 1924, it neither admits nor denies those allegations, and in so far as the same may become material upon the hearing respondent will require strict proof thereof.

X. Respondent has no knowledge of the matters and things alleged in paragraph X, it neither admits nor denies the same and in so far as they may become material upon the hearing respondent will require strict proof thereof.

XI. Respondent has no knowledge that the map attached to and made a part of the petition as Exhibit "D" is true and correct, it [fol. 111] neither admits nor denies the correctness thereof, and in so far as it may become material upon the hearing, respondent will require strict proof thereof.

XII. Respondent denies the allegations of paragraph XII and each and every part of the same, in manner and form as alleged, with this exception: Respondent admits that under the order petitioners must either cease and desist from performing reciprocal switching for each other at Michigan City, Indiana, and interchanging traffic with each other at that point, or must enter into reciprocal switching arrangements with The Chicago, Lake Shore & South Bend Railway Company.

XIII, XIV. Respondent denies the allegations of paragraphs XIII and XIV and each and every part of the same, in manner and form as alleged, with this exception: Respondent alleges that the matters and things alleged in paragraphs XIII and XIV were all heard and determined by the Interstate Commerce Commission and for certainty with respect thereto respondent refers to the reports of the Commission as the same respectively appear in Chicago, Lake Shore & South Bend Railway Company v. Director General, 58 Interstate Commerce Commission Reports, page 647; and Chicago, Lake Shore & South Bend Railway Co. v. Lake Erie & Western Railroad Company, 88 Interstate Commerce Commission Reports, page 525.

XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI. Respondent denies the allegations of paragraphs XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, and XXVI and each and every part of the same, in manner and form as alleged.

Respondent denies each and every allegation in the petition contained not herein specifically admitted or denied.

Wherefore, having fully answered, respondent prays that the [fol. 112] petition be dismissed at the cost of the petitioners and for such other and further order as may be appropriate.

Blackburn Esterline, Assistant to the Solicitor General.
Homer Elliott, United States Attorney.

[fol. 113 & 114] Jurat showing the foregoing was duly sworn to by Blackburn Esterline omitted in printing.

[fol.115] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF CLINT C. HINE—Filed July 8, 1924

Clint C. Hine being first duly sworn according to law, deposes and says, that on June 26, 1924, he mailed by registered mail, postage prepaid, to the Secretary of the Interstate Commerce Commission, at Washington, D. C., a copy of the petition filed in the Clerk's office of the United States District Court, at Indianapolis, Indiana, in the above entitled cause, and a notice to the effect that on July 8th, 1924, petitioners in the above entitled cause will apply for an interlocutory injunction therein, a copy of which said notice is attached hereto and made a part hereof as Exhibit "A".

Affiant further states that with said notice he enclosed a letter addressed to said Secretary of the Interstate Commerce Commission, a copy of which said letter is attached hereto and made a part hereof as Exhibit "B".

Affiant also attaches hereto, and makes a part hereof as Exhibit [fol. 116] "C", the receipt of the said Secretary of the Interstate Commerce Commission for said copy of said notice and said petition mailed to him, as aforesaid.

Affiant further deposes and says, that on June 26, 1924, he mailed, by registered mail, postage prepaid, a copy of the petition filed in the Clerk's Office of the United States District Court, at Indianapolis, Indiana, in the above entitled cause, and a notice to the effect that on July 8, 1924, the petitioners in the above entitled cause will apply for an interlocutory injunction therein, to the Honorable Harlan F. Stone, Attorney General of the United States, at Washington, D. C., a copy of which said notice is attached hereto and made a part hereof as Exhibit "A".

Affiant further says that he wrote a letter to said Attorney General of the United States, which he enclosed with said notice and petition, a copy of which said letter is attached hereto and made a part hereof as Exhibit "D".

Affiant also attaches hereto, and makes a part hereof as Exhibit "E", the receipt of the said Attorney General of the United States for said copy of said notice and petition so mailed to him, as aforesaid.

And further affiant saith not.

Clint C. Hine.

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 7th day of July, 1924. B. G. Stackhouse, Notary Public, Cook County, Illinois. My commission expires March 2nd, 1925. (Seal.)

[fol. 117] "EXHIBIT A" TO AFFIDAVIT

[Title omitted]

NOTICE OF MOTION FOR INTERLOCUTORY INJUNCTION

To the Interstate Commerce Commission and the Honorable Harlan F. Stone, Attorney General of the United States, Washington, D. C.

Please take notice that on the 8th day of July, 1924 at ten o'clock A. M. on said day, or as soon thereafter as counsel can be heard, we shall appear before the Honorable Albert B. Anderson and two other judges, in the United States District Court Room in the Federal Building at Indianapolis, Indiana, in the above entitled cause, and make application for an interlocutory injunction in said cause to suspend and restrain the enforcement, operation and execution of the order of the Interstate Commerce Commission made and entered in the case of "The Chicago, Lake Shore & South Bend Railway Company, Complainant, vs. Lake Erie & Western Railroad Company et al., Defendants" I. C. C. Docket No. 13205, when and where you may be present if you see fit.

A copy of the petition in the above entitled cause is enclosed herewith.

Wm. L. Taylor, L. P. Day, C. C. Hine, Solicitors for Petitioner.

[fol. 118] "EXHIBIT B" TO AFFIDAVIT

June 26, 1924.

Hon. George B. McGinty, Secretary Interstate Commerce Commission, Washington, D. C.

DEAR SIR: Referring to my letter to you of date June 24th, sending you copy of petition filed on that date in the District Court of the United States for the District of Indiana, at Indianapolis, Indiana, in the case of Chicago, Indianapolis and Louisville Railway Company vs. United States, being cause number 804 in Equity, and the notice enclosed with that letter to the effect that on July 3, 1924, the petitioners in that case would apply for an interlocutory injunction.

I am just advised that Judge Anderson has fixed July 8th, instead of July 3rd, as the date for hearing the application for an interlocutory injunction in this case, and I am therefore sending you enclosed a formal notice to the effect that we will apply for an interlocutory injunction on July 8th.

The notice fixing the date of July 3rd, heretofore sent you, should be disregarded.

Yours very truly, C. C. Hine, General Solicitor. CCH:M.

Encl.

[fol. 119] "EXHIBIT D" TO AFFIDAVIT

June 26, 1924.

Hon. Harlan F. Stone, Attorney General United States, Washington, D. C.

DEAR SIR: Referring to my letter to you of date June 24th, sending you copy of petition filed on that date in the District Court of the United States for the District of Indiana, at Indianapolis, Indiana, in the case of Chicago, Indianapolis and Louisville Railway Company vs. United States, being cause number 804 in Equity, and the notice enclosed with that letter to the effect that on July 3, 1924, the petitioners in that case would apply for an interlocutory injunction.

I am just advised that Judge Anderson has fixed July 8th, instead of July 3rd, as the date for hearing the application for an interlocutory injunction in this case, and I am therefore sending you enclosed a formal notice to the effect that we will apply for an interlocutory injunction on July 8th.

The notice fixing the date of July 3rd, heretofore sent you, should be disregarded.

Yours very truly, C. C. Hine, General Solicitor. CCH:M.

Encl.

[fol. 120] EXHIBIT C TO AFFIDAVIT

Post Office Department, Official Business.
Penalty for private use to avoid payment of postage, $300.
Registered article No. 1,816,868.
Insured parcel No. —.
Postmark of Delivering Office and date of delivery ——.
69315.
Return to C. C. Hine, Gen. Solicitor.
Street and number or Post Office box: Chic., Ind. & Louis. Ry., Transp. Bldg., Chicago, Illinois.

Receipt for Registered Article No. 816,858

Registered at the Post Office indicated in Postmark: Chicago, Ill., Jun. 26, 1924, Registered.
Fee paid, 10 cents. Class postage: —.
Accepting employee will place his initial in spaces applicable below, to indicate endorsement, etc.
Delivery restricted to addressee in person — or order —.
Return receipt demanded. Spl. Dly.

Postmaster, per EAC. (mailing office).

Complete record of registered mail is kept at the post office, but the sender should write the name of the addressee on back hereof

as an identification. Preserve and submit this receipt in case of inquiry, or application for indemnity.

Registry Fees and Indemnity.—Domestic letters and sealed parcels indemnified for $50 or less, 10 cents; for over $50 and not in excess of $100, 20 cents; domestic second-class, not indemnified, 10 cents; domestic third-class, indemnified up to $25, 10 cents; articles addressed to foreign countries, regardless of class or indemnity, 10 cents. Claims must be filed with postmaster within one year from date of mailing.

Form 3806.

[fol. 121] Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

G. B. McGinty, C. C. (signature or name of addressee). J. Messina (signature of addressee's agent).

Date of Delivery: 6/28, 1924.

[fol. 122] Exhibit E to Affidavit

Post Office Department, Official Business.
Penalty for private use to avoid payment of postage, $300.
Registered article No. 816,857.
Insured parcel No. —.
Postmark of Delivering Office and date of delivery ——.
69316.
Return to C. C. Hine, Gen. Solicitor.
Street and number or Post Office box: Chic., Ind. & Louis. Ry., Transp. Bldg., Chicago, Illinois.

Receipt for Registered Article No. 816,857

Registered at the Post Office indicated in Postmark: Chicago, Ill., Jun. 26, 1924, Registered.
Fee paid, 10 cents. Class postage: —.
Accepting employee will place his initial in spaces applicable below, to indicate endorsement, etc.
Delivery restricted to addressee in person — or order —.
Return receipt demanded. Spl. Dly.

Postmaster, per EAC. (mailing office).

Complete record of registered mail is kept at the post office, but the sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry, or application for indemnity.

Registry Fees and Indemnity.—Domestic letters and sealed parcels indemnified for $50 or less, 10 cents; for over $50 and not in excess

of $100, 20 cents; domestic second-class, not indemnified, 10 cents; domestic third-class, indemnified up to $25, 10 cents; articles addressed to foreign countries, regardless of class or indemnity, 10 cents. Claims must be filed with postmaster within one year from date of mailing.

Form 3806.

[fol. 128] Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

Harlan F. Stone, Atty. Gen. (signature or name of addressee).

E. D. Carriss (signature of addressee's agent).

Date of delivery: 6-28-24.

[fol. 124] In United States District Court

Judgment—July 8, 1924

This cause comes on to be heard before the Honorables Samuel Alschuler, Circuit Judge, Albert B. Anderson, District Judge, and Walter C. Lindley, District Judge, upon the plaintiffs' application for an interlocutory injunction and upon the pleadings, proceedings and proofs herein filed on behalf of both parties and the intervenors, and the argument of counsel is heard, and upon consideration thereof,

It is ordered that the said application for an interlocutory injunction be and the same is denied.

In United States District Court

Order Allowing Appeal

And now before the said three honorable judges, all the parties being present by counsel, the plaintiffs file their petition for an appeal with assignment of errors to the Supreme Court of the United States from the said order denying an interlocutory injunction, and the Court now sustains the said petition and grants such appeal, upon the plaintiffs' filing bond in the sum of one thousand dollars ($1,000.00) with sureties to be approved by the clerk.

[fol. 125] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

The above named petitioners, Chicago, Indianapolis and Louisville Railway Company, The Michigan Central Railroad Company, The New York, Chicago & St. Louis Railroad Company (successor by consolidation to the Lake Erie and Western Railroad Company), and The Pere Marquette Railway Company, conceiving themselves aggrieved by the order entered on July 8, 1924 in the above entitled proceeding, denying the application of said petitioners for an interlocutory injunction in said cause, do hereby appeal from said order to the Supreme Court of the United States, for the reasons specified in the assignment of Errors which is filed herewith, and they pray that their appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States. Dated this 8th day of July, 1924.

William L. Taylor, L. P. Day, C. C. Hine, Solicitors for Petitioners and Appellants Chicago, Indianapolis and Louisville Railway Company, The Michigan Central Railroad Company, the New York, Chicago & St. Louis Railroad Company (successors by consolidation to the Lake Erie and Western Railroad Company), and the Pere Marquette Railway Company.

[fol. 126] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

And now come Chicago, Indianapolis and Louisville Railway Company, The Michigan Central Railroad Company, the New York, Chicago & St. Louis Railroad Company (successor by consolidation to the Lake Erie and Western Railroad Company), and The Pere Marquette Railway Company, appellants in the above entitled cause, and make and file this, their joint and several assignment of Error:

1. The District Court of the United States for the District of Indiana, erred in denying the application of appellants and each of them, separately and severally, for an interlocutory injunction in the action below.

2. The order of the District Court of the United States for the district of Indiana, denying appellants' application, and the application of each of them separately and severally, for an interlocutory injunction in the action below, is contrary to law.

3. The District Court of the United States for the District of Indiana, erred in denying the appellants' application and the application of each of them separately and severally, for an inter- [fol. 127] locutory injunction in the cause below, for the reason that the order of the Interstate Commerce Commission, the enforcement of which the appellants sought to enjoin and suspend, is contrary to law and deprives these appellants of their property without due process of law in violation of the Constitution of the United States.

4. The District Court of the United States for the District of Indiana, erred in denying the appellants' application and the application of each of them separately and severally, for an interlocutory injunction in the cause below, for the reason that the order of the Interstate Commerce Commission which appellants sought to enjoin and suspend, is contrary to and not supported by the undisputed facts found in the report of the Interstate Commerce Commission.

5. The District Court of the United States for the District of Indiana, erred in denying appellants' application, and the application of each of them separately and severally for an interlocutory injunction in the cause below, for the reason that the undisputed facts found and reported by the Interstate Commerce Commission show conclusively that no unjust discrimination or undue prejudice exists with respect to the several matters in issue before the Interstate Commerce Commission, and therefore the order of the Interstate Commerce Commission is unlawful.

6. The District Court of the United States for the District of Indiana, erred in denying the appellants' application, and the application of each of them separately and severally, for the reason that the order of the Interstate Commerce Commission which the appellants sought to enjoin and suspend, is arbitrary, unlawful and not supported or sustained by the undisputed facts.

7. The District Court of the United States for the District of Indiana, erred in denying the appellants' application, and the application of each of them separately and severally, for the reason that the report and order of the Interstate Commerce Commission which the appellants sought to enjoin and suspend, shows that no [fols. 128-129] evidence was submitted sufficient to prove that the Interstate Commerce Commission has jurisdiction over the Chicago, Lake Shore and South Bend Railway Company and authority to make the order complained of.

8. The District Court of the United States for the District of Indiana, erred in denying the appellants' application, and the application of each of them separately and severally, for the reason that the said report of the Interstate Commerce Commission shows on its face that no substantial evidence was introduced to prove that the Interstate Commerce Commission had jurisdiction over the Chicago, Lake Shore & South Bend Railway Company.

Wherefore, appellants, jointly and severally, pray that the order of the District Court of the United States for the District of Indiana denying appellants' application for an interlocutory injunction be set aside and that said Court be directed to grant said application for an interlocutory injunction and such further relief as the Court may deem just.

William L. Taylor, Indianapolis, Ind.; L. P. Day, Chicago, Ills.; C. C. Hine, 1422 Transportation Bldg., Chicago, Ills., Solicitors for Appellants Chicago, Indianapolis and Louisville Railway Company, The Michigan Central Railroad Company, The New York, Chicago & St. Louis Railroad Company (successor by consolidation to the Lake Erie and Western Railroad Company), and The Pere Marquette Railway Company.

[fol. 130] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 11, 1924

To the Clerk:

You are requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause and to include in such transcript of record the following papers to-wit:

1. Petition filed by petitioners.
2. Petition for intervention of Interstate Commerce Commission.
3. Petition for intervention of Chicago, Lake Shore & South Bend Railway Company.
4. Notice of proof of service of petition upon the Intestate Commerce Commission and the Attorney General of the United States.
5. Proof of service of notice fixing July 8th, 1924 for hearing application for interlocutory injunction.
6. Answer of United States.
7. Answer of Interstate Commerce Commission.
8. Answer of Chicago, Lake *South* & South Bend Railway Company.
9. Petition for appeal.
10. Assignment of Errors.
11. All appearances filed in said cause.

Also all orders and entries made in said cause and all motions made during the hearing on the application for interlocutory injunction together with all entries and orders showing the Court's ruling thereon.

[fols. 131 & 132] Respectfully, William L. Taylor, L. P. Day, Attorneys for Appellants.

[fol. 133] [Title omitted]

Clint C. Hine being first duly sworn, according to law, says:

That on July 15, 1924, affiant served a copy of the præcipe filed in the above entitled cause on the respondent, United States of America, by mailing a true copy thereof, postage prepaid, to Blackburn Esterline, Assistant to the Solicitor General of the United States, at Washington, D. C., and that said affiant enclosed with said præcipe and mailed to said party at said time, a true copy of the petition for appeal and a true copy of the assignment of errors filed in the above entitled cause as of July 8th, 1924;

That on July 15, 1924, affiant served a copy of the præcipe filed in the above entitled cause on the respondent, Interstate Commerce Commission, by mailing a true copy thereof, postage prepaid, to R. Granville Curry, Attorney for said Interstate Commerce Commission, at Washington, D. C., and that said affiant enclosed with said præcipe [fols. 134 & 135] and mailed to said party at said time, a true copy of the petition for appeal and the assignment of errors filed in the above entitled cause as of July 8th, 1924;

That on July 15, 1924, this affiant served a copy of the præcipe filed in the above entitled cause on the respondent, Chicago, Lake Shore & South Bend Railway Company, by mailing a true copy thereof, postage prepaid to E. S. Ballard, Attorney for said respondent, at Chicago, Illinois, and that said affiant enclosed with said præcipe and mailed to said party at said time a true copy of the petition for appeal and a true copy of the assignment of errors filed in the above entitled cause as of July 8, 1924.

And further affiant sayeth not.

Clint Cline.

Subscribed and sworn to before me, a Notary Public in and for Cook County, Illinois, this 16 day of July, A. D. 1924. B. G. Stackhouse, Notary Public, Cook County, Illinois. My commission expires March 2, 1925. (Seal.)

[fols. 136-140] Bond on Appeal for $1,000—Approved and filed July 29, 1924; omitted in printing

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[fol 141] In United States District Court

Clerk's Certificate

I, William P. Kappes, Clerk of the District Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete transcript of the record according to the præcipe in the case of the Chicago, Indianapolis

and Louisville Railway Company, et al, vs. United States of America, as the same appears of record in my office.

Witness my hand and the Seal of said Court, this 29 day of July, 1924.

William P. Kappes, Clerk. (Seal of the District Court of the United States, District of Indiana.)

Endorsed on cover: File No. 30,531. Indiana D. C. U. S. Term No. 566. Chicago, Indianapolis and Louisville Railway Company, The Michigan Central Railroad Company, The New York, Chicago & St. Louis Railroad Company, etc., et al., appellants, vs. The United States of America, Interstate Commerce Commission, and Chicago, Lake Shore & South Bend Railway Company. Filed August 1st, 1924. File No. 30,531.

APPELLANTS

BRIEF

No. 150.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY; THE MICHIGAN CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY (Successor by Consolidation to the Lake Erie and Western Railroad Company), and THE PERE MARQUETTE RAILWAY COMPANY,

Appellants,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLANTS.

WILLIAM L. TAYLOR,
C. C. HINE,
Counsel for Appellants.

BARNARD & MILLER PRINT, CHICAGO

SUBJECT INDEX.

TABLE OF CASES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 150.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY; THE MICHIGAN CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY (Successor by Consolidation to the Lake Erie and Western Railroad Company), and THE PERE MARQUETTE RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLANTS.

OPINION OF COURT BELOW.

No written opinion was delivered by the court below, and the decision appealed from is not reported.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED.

The judgment to be reviewed was rendered on July 8, 1924, by a three-judge court consisting of one circuit judge and two district judges. (Rec., 62.) The basis

of this court's jurisdiction is the judgment denying appellants' application for an interlocutory injunction to suspend and restrain the enforcement of an order of the Interstate Commercie Commission (Rec., 62) and the provisions of the Act of June 18, 1910, c. 309, 36 Stat. L. 539; the Act of March 3, 1911, c. 231, 36 Stat. L. 1087; and the Act of October 22, 1913, c. 32, 38 Stat. L. 219.

The Acts of June 18, 1910, and March 3, 1911, provide for the filing of suits in the Commerce Court against the United States, to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission. By the Act of October 22, 1913, the Commerce Court was abolished, and the jurisdiction thereof was transferred and vested in the several district courts of the United States. Said Act of October 22, 1913, provides that an appeal may be taken direct to the Supreme Court of the United States from an order denying an interlocutory injunction in an action to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission.

Central R. Co. of New Jersey, et al. v. *United States, et al.*, 42 Sup. Ct. Rep. 80.

Statement of the Case.

On June 24, 1924, appellants filed their verified petition in the lower court, naming the United States of America as the defendant, and alleging the invalidity of a certain order of the Interstate Commerce Commission. (Rec., 1.) The petition alleges, among other things, that the order of the Commission is unlawful and void because it is not sustained and supported by the report and findings of fact of the Commission (Rec., 6); that it is not based on any substantial evidence which supports and justifies it (Rec., 7); and that it is in violation of the provisions of the fifth amendment to the

Constitution of the United States, prohibiting the deprivation of life, liberty or property without due process of law. (Rec., 9.) The relief sought by the petition was an interlocutory injunction restraining and suspending the order of the Interstate Commerce Commission, and upon final hearing a decree enjoining, setting aside, annulling and suspending the said order. (Rec., 11.) On July 8, 1924, the Chicago, Lake Shore & South Bend Railway Company was granted leave to intervene and filed an answer to the petition. (Rec., 35.) The Interstate Commerce Commission intervened and filed answer to the petition on July 8, 1924 (Rec., 53) and on the same date, the United States filed its answer. (Rec., 56.)

Pursuant to notice (Rec., 31-58-59) and on July 8, 1924, appellants applied for an interlocutory injunction to suspend and restrain the enforcement, operation and execution of the order of the Interstate Commerce Commission complained of. Counsel for the defendant and interveners were present, and the application was argued before a three-judge court consisting of one circuit judge and two district judges, and an order was entered denying the application for an interlocutory injunction. (Rec., 62.) On the same day, all parties being present by counsel, appellants filed their petition for an appeal, with assignment of errors, to this court, from the order denying the interlocutory injunction (Rec., 62-63) and an order was entered granting such appeal. (Rec., 62.)

The facts material to this appeal, and which are admitted by the answers filed by appellees, are set out in the petition filed in the lower court and the exhibits attached thereto (Rec., 1) and are as follows:

On October 7, 1921, the Chicago, Lake Shore & South Bend Railway Company (hereinafter referred to as the South Shore Line), filed with the Interstate Commerce Commission a complaint against the Chicago, Indianapo-

lis and Louisville Railway Company (hereinafter referred to as the Monon), the Michigan Central Railroad Company (hereinafter referred to as the Michigan Central), the Lake Erie and Western Railway Company (hereinafter referred to as the Lake Erie), and the Pere Marquette Railway Company (hereinafter referred to as the Pere Marquette), the appellants herein, the same being docketed by the Interstate Commerce Commission as Number 13205, and on October 27, 1921, said complainant filed an amended and supplemental complaint. By said amended complaint, the complainant alleged that the refusal of each of the defendants (appellants herein) to enter into reciprocal switching arrangements at Michigan City, Indiana, with complainant, including the absorption of switching charges upon the same terms and conditions as with the other defendants respectively at that point, and to switch between complainant's line and industries at Michigan City freight transported to or from Michigan City by complainant upon the same terms as those upon which each defendant performs like service for the other defendants respectively, is unjustly discriminatory and unduly prejudicial to complainant, and to shippers and traffic, and denies the complainant equal facilities of interchange, in violation of Section 2 and paragraphs 1 and 3 of Section 3 of the Interstate Commerce Act. The defendants answered the amended complaint, and upon the issues thus joined, a hearing was had before an examiner of the Interstate Commerce Commission. The Examiner made and filed his proposed report, to which the defendants in that case filed exceptions, and the cause was then argued orally before Division 3 of the Interstate Commerce Commission. Thereafter, and on April 2, 1924, Division 3 issued its report and order in that cause. Said report and order were not served on the appellants herein until on or about May 6, 1924. Thereafter, and

n or about May 26, 1924, appellants herein filed with ne Interstate Commerce Commission a petition for a eargument of said cause before the full Commission, nd for an extension of the effective date of said order. 'he petition for a reargument was denied by the Inter- tate Commerce Commission on June 17, 1924. On June 1, 1924, the Commission amended its said order of pril 2, 1924, so as to provide for compliance therewith n ten days' notice instead of thirty days' notice as riginally provided in said order.

The report of the commission, omitting the caption, as follows:

DIVISION 3, COMMISSIONERS HALL, CAMPBELL AND COX.

Cox, *Commissioner:*

Exceptions were filed by defendants to the report proposed by the examiner and the case was orally argued.

Complainant, the Chicago, Lake Shore & South Bend Railway Company, is an electric line approximately 76 miles long which operates between South Bend, Ind., and Kensington, Ill., a point within the corporate limits of the city of Chicago. By complaint filed October 7, 1921, as amended, it alleges that the refusal of each of the defendants to enter into reciprocal switching arrangements at Michigan City, Ind., with complainant including absorption of switching charges, upon the same terms and conditions as with the other defendants respectively at that point, and to switch between complainant's lines and industries at Michigan City freight transported to or from Michigan City by complainant upon the same terms as those upon which each defendant performs like service for the other defendants respectively, is unjustly discriminatory and unduly prejudicial to complainant and its shippers and traffic and denies to complainant equal facilities of interchange in violation of sections 2 and 3 of the interstate commerce act. We are asked to require the defendants to put in force and apply in the future reciprocal switching arrangements with complainant, including absorption of switching charges

upon the same terms and conditions as those now in force and applied by defendants each with the other. The Michigan City Chamber of Commerce and the Manufacturers' Club of Michigan City intervened in support of complainant. Rates are stated in amounts per car unless otherwise indicated.

The Chicago, Lake Shore & South Bend Railway will be referred to hereinafter as the South Shore and the Chicago, Indianapolis & Louisville Railway as the Monon. The South Shore was fully described and its status defined in *Chicago, Lake Shore & S. B. Ry. Co.* v. *Director General*, 58 I. C. C. 647. Its president testified that there has been no important change in the construction or operation of its lines since that decision.

At Michigan City the South Shore has a connection and interchange facilities with the Lake Erie & Western. The Lake Erie & Western also connects directly with the Monon and the Michigan Central. The Monon connects with the Pere Marquette, Lake Erie & Western, and Michigan Central, and acts as an intermediate line for the interchange of freight between points on the Pere Marquette on the one hand and points on the Lake Erie & Western and the Michigan Central on the other. The Lake Erie & Western and Michigan Central do not connect with the Pere Marquette, and the Michigan Central, Pere Marquette, and Monon do not connect with the South Shore.

In *Chicago, Lake Shore & S. B. Ry. Co.* v. *Director General, supra,* we directed the Lake Erie & Western to enter into reciprocal switching arrangements at Michigan City with the South Shore to the same extent and upon the same terms and conditions as those upon which it participates in such an arrangement at that point in connection with the Pere Marquette or the Monon. The Lake Erie & Western complied with our order by entering into reciprocal switching arrangements with complainant. In this proceeding complainant asks that we direct the Michigan Central, Pere Marquette, and Monon to enter into reciprocal switching arrangements with the South Shore upon the same terms and conditions as exist between those lines. The Lake Erie & Western is necessarily an intermediate

carrier of traffic which may move between the lines of the other three defendants and complainant's line. Under the present arrangements, it does not, and could not, because of its location, act as an intermediate carrier between any of the steam roads at Michigan City. Complainant contends that since that defendant switches for the other defendants to the extent of its ability and has opened its terminals fully to them, it can not at the same time lawfully refuse to perform the intermediate switching service for complainant.

The switching charges and practices of the various roads at Michigan City at present in effect are as follows:

Michigan Central.—To and from its connections with the Monon and the Lake Erie & Western and on traffic to or from the Pere Marquette from or to its industrial tracks, switching charges of $6.30 apply on local traffic and $4.50 on traffic where a road haul has been or will be performed. The Monon's intermediate-switching charge is added on traffic to or from the Pere Marquette. The Michigan Central absorbs switching charges on loaded cars handled by it in road-haul movement and delivered on tracks of the other steam roads in Michigan City where the minimum road-haul revenue after absorption is $19 per car.

Monon.—To or from industries on the Monon and its connections with the Lake Erie & Western, Michigan Central, and Pere Marquette its switching charges are $3.60, $4.50, and 0.5 cent per 100 pounds (minimum $4.50 per car), respectively. Its intermediate-switching charge between the lines of the Pere Marquette and Michigan Central is $4.50 and between the Pere Marquette and the Lake Erie & Western, $3.15. The Monon absorbs the switching charges of the other steam roads where the road-haul revenue is at least $12.50 after absorption.

Pere Marquette.—Its switching charge is 0.5 cent per 100 pounds, minimum $4.50, between its private sidings and tracks and its connection with the Monon, $3.60 on traffic between its private and industrial tracks and the Lake Erie & Western, and $3.60 on traffic between its private sidings and the Michigan Central. The Monon's intermediate-switching

charges are added on traffic to or from the Lake Erie & Western or the Michigan Central. The Pere Marquette absorbs the switching charges of the other steam roads where the road-haul revenue after the absorption is at least $19.

Lake Erie & Western.—Its interchange switching charges between its connections with the Michigan Central, Monon, or South Shore is $3.60 to certain industries on its line and $6.30 to certain other industries. On traffic to or from the Pere Marquette the amounts are also $3.60 to certain industries and $6.30 to others, plus the $3.15 intermediate-switching charge of the Monon. Its industrial-switching rate is $4.95 where the interchange-switching charge is $3.60, and $8.10 where the interchange-switching charge is $6.30. It does not publish an intermediate-switching charge applicable on traffic between its connection with the South Shore and its connections with the Michigan Central and the Monon. Absorptions of switching charges are made as shown in its tariffs.

South Shore.—Its switching charge is $4.50 per car between industries on its line and its connection with the Lake Erie & Western. Its tariff authorizes absorption of the switching charges of the steam roads at Michigan City on all traffic moving over its line where the earnings of the South Shore and its connections are at least $15 after absorption.

The Michigan Central, Pere Marquette, and Monon tariffs do not make any provision for reciprocal switching with the South Shore.

Defendants, except the Lake Erie & Western, do not switch traffic to industries on the South Shore or from the South Shore to industries located on their rails. Neither have they in the past except in a few instances. A few shipments destined to industries on the Michigan Central or Monon arrived in Michigan City via the South Shore and were switched as a matter of convenience to the industry and a switching charge was collected in addition to the line-haul rate. Company material consigned to the South Shore is switched over the defendants' lines and the charges are absorbed because the South Shore is named as an industry in

the defendants' tariffs. Also in a few cases, cars arriving in Michigan City over the steam lines consigned to an industry on the South Shore have been delivered to the South Shore either by having the car reconsigned or by changing the billing so as to make the South Shore appear as consignee.

There are three industries located on complainant's line at Michigan City and about 60 industries located on the lines of defendants. Two of the industries on the South Shore have practically no outbound tonnage and their inbound freight consists chiefly of coal, ice, and groceries. One of these was located on the Lake Erie & Western rails until December, 1921. The other is located on the Monon as well as on the South Shore, and receives groceries by the electric line and coal via the Monon. The Monon track beside the coal bins is from 50 to 60 feet from the warehouse. These industries compete with industries on the steam roads. The third industry receives and ships in carload and less-than-carload quantities. It is located on the South Shore a short distance from the point where that line is intersected by the Lake Erie & Western tracks. It was formerly served by the Lake Erie & Western whose right of way extends to the fence inclosing the industry's property.

Witnesses for the above industries testified that it would be to their advantage if the South Shore had reciprocal switching arrangements with all the steam lines at Michigan City. Under the present arrangement they are required to receive traffic transported to Michigan City by the Michigan Central and Pere Marquette on the team tracks of those roads, and in some instances above referred to they have been required to pay an additional switching charge. Six shippers located on the rails of the Monon, Michigan Central, and Pere Marquette testified that they have used the South Shore for less-than-carload traffic and have received very efficient and expeditious service, in many instances superior to that of the steam roads. If reciprocal switching arrangements were in effect and if the carload service were as good as the less-than-carload service they would divert a portion of their carload traffic from the steam lines to the South Shore. The

service rendered by the steam lines has, on the whole, been satisfactory during the past year. Several shippers located on defendants' lines at Michigan City, including some of the largest shippers of both inbound and outbound freight, testified that the service afforded by the steam lines is entirely adequate, and that they would not be benefited by the establishment of the reciprocal switching arrangements with the electric line.

Exhibits of record show the number of cars brought into Michigan City by the South Shore and switched to industries on the Lake Erie & Western, and the number of cars brought in by the Lake Erie & Western and switched to South Shore industries. Complainant's exhibits, only slightly at variance from those introduced by defendants, show that during 1921, when reciprocal switching arrangements were in effect between the Lake Erie & Western and the South Shore, the South Shore handled into Michigan City 162 cars which were switched to industries on the Lake Erie & Western. Of this number 29 cars were consigned to complainant's power house prior to October. During the remainder of the year 72 cars were switched to the Northern Indiana Gas & Electric Company, a corporation distinct from the South Shore, which had leased its power house. Therefore, 101 cars of a total of 162 were loaded with coal for the power house which prior to October was controlled by the complainant. In the same year the South Shore switched approximately 17 cars from the Lake Erie & Western to industries on its line. Defendants contend that this statement of the amount of interchange traffic clearly indicates that only a very small number of shippers at Michigan City would be benefited by the extension of interchange switching.

Defendants maintain that this proceeding is merely an attempt by the South Shore to obtain from them traffic which they are now handling satisfactorily. Complainant's general manager admitted, practically without qualification, that the steam roads were serving their industries adequately at the time of hearing and that the electric line wished to divide the business. Most of the traffic transported by the South Shore to Michigan City

consists of coal, lumber, and other commodities received from the Illinois Central, with which it connects at Kensington and with which it has joint rates. The South Shore tracks parallel the Michigan Central tracks between Michigan City and Kensington, at which point they are but 25 feet apart. Both lines serve Gary and Hammond, Ind., which are the principal stations between Chicago and Michigan City.

Statements were introduced showing the number of cars of outbound interstate tonnage from Michigan City over the Michigan Central and the Monon. During three months in 1920 the Michigan Central had 2,073 outbound cars on which the charges were approximately $135,500 and in the same three months in 1921, 1,112 cars, with charges amounting to approximately $70,856. During the same three months in 1920 the outbound tonnage on the Monon amounted to 300 cars, on which the charges were approximately $10,400, and, in 1921, 190 cars with total charges amounting to approximately $7,400.

Statements were also introduced showing the inbound interstate movement of cars to Michigan City over these roads upon which complainant might have received the line-haul movement had reciprocal switching been in effect. During three representative months of each year the number of such cars over the Michigan Central in 1920 was 51, on which its proportion of the revenue was $1,767.01; in 1921, 57 cars on which its proportion of the revenue was $2,243.49. Had the South Shore enjoyed the line-haul movement, the Michigan Central's revenue on these cars would have been reduced to $255 in 1920 and $285 in 1921. During the same representative months the Monon hauled 413 such cars in 1920 and received $17,030.84 as its proportion of the charges; in 1921, 232 cars, with revenue therefrom of $21,966.29. If reciprocal switching had been in effect, the South Shore might have obtained the line-haul movement and reduced the Monon's share of the charges on these cars to $1,239 in 1920 and $928 in 1921.

Freight equipment available early in 1922 amounted to 34,518 cars on the Michigan Central and 5,254 cars on the Lake Erie & Western. The South Shore

has 36 freight cars, the same number it had at the time of the hearing in *Chicago, Lake Shore & S. B. Ry. Co.* v. *Director General, supra,* decided August 4, 1920. Each of the defendant lines has extensive terminal facilities at Michigan City, while the South Shore's facilities are limited and inadequate to handle a large volume of traffic.

Defendants testified that available routes to all parts of the country are afforded by the steam lines. The Monon is crossed by the New York Central; Wabash; Baltimore & Ohio; Grand Trunk; Pennsylvania; New York, Chicago & St. Louis; and Erie. The Michigan Central has direct connection with the Illinois Central at Kensington and with western roads at Joliet. Between Michigan City and Chicago the Michigan Central main line is crossed by the New York Central; Wabash; Baltimore & Ohio; New York, Chicago & St. Louis; Elgin, Joliet & Eastern; Chicago & Erie; Monon; Indiana Harbor Belt; and Illinois Central and other lines. From East Gary to Joilet running north and south the Michigan Central crosses various railroads.

Defendants, citing *Village of Hubbard, Ohio* v. *United States,* 278 Fed. 754, contend that complainant is not a common carrier within the meaning of the interstate commerce act. We specifically found that it was engaged in the general transportation of freight in *Indiana Passenger Fares of C., L. S. & S. B. Ry. Co.,* 69 I. C. C. 180, and this record does not refute that finding.

Defendants contend that they can not be required to enter into reciprocal switching arrangements with the South Shore unless such arrangements can be found to be necessary and desirable in the public interest. They urge that the principle governing the establishment of through routes and joint rates likewise applies to the establishment of reciprocal switching and cite numerous decisions wherein we found that we could require through routes and joint rates only where the interest of the public would be served. In fact, they urge that the test of public convenience and necessity must be applied as stringently as if we were asked to authorize the construction of a new line of railroad. They contend that no such showing has been made. The

Michigan Central contends that if we grant complainant's prayer it will be required to switch at Michigan City traffic which originates on its own line because every point of importance reached by the South Shore between Michigan City and Chicago is also served by the Michigan Central's main line. Our powers under paragraph (4) of section 3 of the interstate commerce act to require the joint use of terminals are not here invoked. Nor does the provision against short-hauling a carrier in section 15 justify a violation of another section. The terminals of defendants are open except to the South Shore. We are asked to require by alternative order the defendant steam carriers to accord to complainant and its shippers and traffic the same rights and privileges which each of the defendants contemporaneously accord to each of the other defendants and its shippers and traffic. The question before us is whether the circumstances surrounding complainant and its traffic are so dissimilar as to justify the present difference in treatment.

The establishment of reciprocal switching from or to the South Shore to or from the Pere Marquette would require three interchanges, and to or from the Michigan Central or the Monon, two interchanges. Under the existing reciprocal switching arrangements between the steam lines only the movements between the Pere Marquette and the Lake Erie & Western or the Michigan Central require two interchanges. A witness for the Michigan Central testified that if reciprocal switching arrangements with the South Shore are put into effect the average time required for the switch movement from the South Shore to an industry on the Michigan Central would be two days. Cars arriving in Michigan City over the Michigan Central at the present time are placed at its industries the same day or the next morning.

Traffic switched to or from the South Shore from or to the steam lines would require intermediate switching over the steam lines for the following distances: (*a*) From or to the Pere Marquette and Monon connection to or from the Lake Erie & Western and South Shore connection, 20,500 feet or 3.88 miles; (*b*) from or to the Michigan Central and

Lake Erie & Western connection to or from the Lake Erie & Western and South Shore connection 7,300 feet or 1.38 miles; (*c*) from or to the Lake Erie & Western and Monon connection to or from Lake Erie & Western and South Shore connection, 9,300 feet or 1.76 miles.

The intermediate distances traversed by the steam lines in switching traffic to or from each other are as follows: (*a*) From or to Pere Marquette and Monon connection to or from Lake Erie & Western and Monon connection, 11,200 feet or 2.12 miles; (*b*) from Pere Marquette and Monon connection to Monon delivery to Michigan Central 2,600 feet or 0.49 mile; (*c*) from Michigan Central delivery to Monon to Pere Marquette and Monon connection 7,200 feet or 1.36 miles.

It was testified that the steam lines not only perform valuable services for each other at Michigan City, but also perform reciprocal switching at other points, and that the South Shore is not able to perform any reciprocal service at any other point and only an inconsequential service at Michigan City. That ground for refusing to enter into reciprocal switching arrangements was rejected in *Buffalo, Rochester & Pittsburgh Ry.* v. *Pennsylvania Co.*, 29 I. C. C. 114. In *Switching at Galesburg, Ill.*, 31 I. C. C. 294, we found that it was unjustly discriminatory against the Rock Island Southern for the Chicago, Burlington & Quincy Railroad to refuse to switch the former's traffic while at the same time switching traffic for the Atchison, Topeka & Santa Fe. The issues and circumstances in that case were very similar to those here under consideration, the chief difference being that the Burlington and Santa Fe had a direct physical connection with the Rock Island Southern. The question of absorptions was not involved in that case. In so far as amendments to the act enacted since those decisions were rendered may have any bearing on the present issues, they have not limited our powers.

The fact that the Lake Erie & Western will be required, if reciprocal switching is maintained, to act as an intermediate carrier of traffic to or from complainant's line is an accident of location and not a transportation difference. In length of haul or

use of intermediate line the situation of the South Shore with respect to the Michigan Central or the Monon is clearly not dissimilar from the situation of the Pere Marquette with respect to the Michigan Central or the Lake Erie & Western. Nor is the fact controlling that three interchanges and a somewhat longer intermediate haul may be required on traffic to or from the Pere Marquette. Each defendant holds itself out to switch practically all traffic of any other defendant, regardless of the length of the switching haul or point of origin or destination of shipment. The contemporaneous refusal to switch traffic for complainant is a denial to it of reasonable, proper, and equal facilities for the interchange of traffic.

Defendants' switching charges and absorptions differ in amount. The measure of the switching charges is not in issue. In our discussion of section 2 of the act in *Richmond Chamber of Commerce* v. *S. A. L. Ry.*, 44 I. C. C. 455, 466, we said:

> "* * * It is the line-haul movement which that section primarily contemplates. Where the short delivery service within the switching district is substantially the same in either instance, we are of the opinion that the line-haul carrier is receiving a greater compensation from one shipper than from another for a like service when it absorbs the switching charges of one switching line and not those of another.
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> * * * * *
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> We do not consider that the carriers must absorb the switching charges indiscriminately to all industries within the switching limits of Richmond if they choose to absorb the switching charges to any one industry off their rails. The illegality herein found to exist is the receiving of a greater compensation for one service than for a like service under substantially similar circumstances and conditions. To take a concrete example and referring again to the diagram. Suppose industry C were 5 miles distant from the interchange tracks of the Seaboard, while industry B were only 2 miles distant. Suppose the Chesapeake & Ohio's switching charge amounted to $5, while that of the

Southern was $2. If the Seaboard absorbed the Southern's $2 switching charge on traffic to industry B, we do not consider that it must absorb the entire $5 switching charge of the Chesapeake & Ohio on traffic to industry C, but only to the extent to which the service is similar. In other words, it would probably be necessary for the Seaboard to absorb $2 of the $5 charge of the Chesapeake & Ohio.'

Upon appeal to the courts the latter paragraph was quoted in *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57. To apply the above illustration to the present situation, if defendants continue the absorption of switching charges at Michigan City and the Monon can reach any industry on any other defendant's rails by a maximum absorption of $6.30 per car, removal of the unjust discrimination against industries on complainant's lines would not require the absorption of a greater amount on traffic destined to or originated at such industries.

We find that (the refusal of defendants to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and the failure and refusal of the defendants to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant upon relatively reasonable terms, based upon a careful consideration of the similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in such arrangements with each other at that point, subjects complainant and its shippers to unjust discrimination and undue prejudice which will be ordered removed).

An appropriate order will be entered." (Rec., 21.)

The order of the commission, omitting the caption, based on the foregoing report, is as follows:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had,

and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before July 24, 1924, and thereafter to abstain, from the unjust discrimination and undue prejudice found in said report to result from their refusal to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and from their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant at Michigan City, Ind., upon relatively reasonable terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at that point.

It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before July 24, 1924, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid unjust discrimination and undue prejudice.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission, division 3.

[SEAL.] GEORGE B. MCGINTY,
Secretary."

(Rec., 30.)

The questions presented by this appeal relate to the validity of the order of the commission upon the facts found and reported by it. Appellee, South Shore Line,

admits that the commission's findings are supported by substantial evidence of record before the commission (Rec., 50); appellee, Interstate Commerce Commission, in its answer, denies any allegations in conflict with the findings or conclusions of fact included in the report of the commission (Rec., 55); and the United States, by its answer, admits the correctness of the findings of fact in the report of the commission. (Rec., 56.)

We are setting out in an appendix hereto, Sections 2 and 3 of the Interstate Commerce Act, as amended, which are the sections it was alleged these appellants were violating. We are also setting out in the appendix paragraphs 3 and 4 of Section 15 of the Interstate Commerce Act, which have a bearing on the questions presented.

Assignment of Errors.

The assigned errors are as follows (Rec., 63-64):

1. The District Court of the United States for the District of Indiana, erred in denying the application of appellants and each of them, separately and severally, for an interlocutory injunction in the action below.

2. The order of the District Court of the United States for the district of Indiana, denying appellants' application, and the application of each of them separately and severally, for an interlocutory injunction in the action below, is contrary to law.

3. The District Court of the United States for the District of Indiana, erred in denying the appellants' application and the application of each of them separately and severally, for an interlocutory injunction in the cause below, for the reason that the order of the Interstate Commerce Commission, the enforcement of which the appellants sought to enjoin and suspend, is contrary to

and deprives these appellants of their property hout due process of law in violation of the Constitu- n of the United States.

. The District Court of the United States for the trict of Indiana, erred in denying the appellants' plication and the application of each of them separ- ly and severally, for an interlocutory injunction in cause below, for the reason that the order of the erstate Commerce Commission which appellants ght to enjoin and suspend, is contrary to and not pported by the undisputed facts found in the report the Interstate Commerce Commission.

5. The District Court of the United States for the strict of Indiana, erred in denying appellants' appli- ion, and the application of each of them separately l severally for an interlocutory injunction in the use below, for the reason that the undisputed facts nd and reported by the Interstate Commerce Com- ssion show conclusively that no unjust discrimination undue prejudice exists with respect to the several tters in issue before the Interstate Commerce Com- ssion, and therefore the order of the Interstate Com- rce Commission is unlawful.

6. The District Court of the United States for the strict of Indiana, erred in denying the appellants' ap- cation, and the application of each of them separately d severally, for the reason that the order of the Inter- te Commerce Commission which the appellants sought enjoin and suspend, is arbitrary, unlawful and not pported or sustained by the undisputed facts.

7. The District Court of the United States for the strict of Indiana, erred in denying the appellants' ap- ication, and the application of each of them separately d severally, for the reason that the report and order

of the Interstate Commerce Commission which the appellants sought to enjoin and suspend, shows that no evidence was submitted sufficient to prove that the Interstate Commerce Commission has jurisdiction over Chicago, Lake Shore and South Bend Railway Company and authority to make the order complained of.

8. The District Court of the United States for the District of Indiana, erred in denying the appellants' application, and the application of each of them separately and severally, for the reason that the said report of the Interstate Commerce Commission shows on its face that no substantial evidence was introduced to prove that the Interstate Commerce Commission had jurisdiction over the Chicago, Lake Shore & South Bend Railway Company.

Summary of Argument.

I.

An order of the Commission that is contrary to, and ot supported by the facts, is contrary to law, and should e set aside.

Interstate Commerce Commission and United States v. *L. & N. R. Co.*, 57 L. Ed. 431; 227 U. S. 88.

St. Louis, I. M. & S. R. Co. v. *United States, et al.*, 217 Fed. 80.

United States v. *Louisiana & P. R. Co., et al.*, 58 L. Ed. 1185.

II.

The order of the Commission is contrary to, and not ustained by the undisputed facts, because:

(a) Unlawful discrimination cannot exist unless here is a physical connection by the carrier alleged to e guilty of the discrimination with the railroad or ship- er claiming to be discriminated against, or a service eing performed for the railroad or shipper discrimi- ated against through the medium of joint routes or oint rates. Here three of the appellants do not come n contact and have no physical connection with the South Shore and its shippers, and do not perform any ervice for the South Shore and its shippers through he medium of joint routes or joint rates.

St. Louis, I. M. & S. R. Co. et al. v. *United States*, 217 Fed. Rep. 80.

St. Louis S. W. R. Co. et al. v. *United States,* 38 Sup. Ct. Rep. 49; 245 U. S. 136.

Central R. Co. of N. J. et al. v. *United States et al.,* 42 Sup. Ct. Rep. 80; 257 U. S. 247.

(b) The circumstances and conditions are dissimilar, and for that reason, the order of the Commission is unlawful.

United States v. *Oregon R. R. & Navigation Co.,* 159 Fed. 975.

Seaboard Air Line v. *United States,* 41 Sup. Ct. Rep. 24.

Central R. Co. of N. J. et al. v. *United States et al.,* 42 Sup. Ct. Rep. 80.

III.

The order of the Commission deprives these appellants of their property without due process of law, in violation of the fifth amendment to the Federal Constitution, and is, therefore, unlawful.

L. & N. R. Co. v. *Central Stock Yards,* 53 L. Ed. 441; 212 U. S. 132.

C. I. & L. R. Co. v. *Public Service Commission,* 188 Ind. 334; 121 N. E. 276.

Indiana Harbor Belt R. Co. v. *Public Service Commission,* 187 Ind. 660.

IV.

The record shows that no satisfactory evidence was introduced before the Commission to show that the South Shore is such a common carrier as comes within the provisions of the Interstate Commerce Act.

ARGUMENT.

I.

AN ORDER OF THE COMISSION THAT IS CONTRARY TO AND NOT SUPPORTED BY THE FACTS, IS CONTRARY TO LAW, AND SHOULD BE SET ASIDE.

It has been repeatedly held that if an order of the Interstate Commerce Commission is unsupported by substantial evidence; if it is contrary to the indisputable character of the evidence; if it deprives a carrier of a constitutional or statutory right, or if, for any reason, the order is contrary to law, it is the duty of the court to set such order aside.

In *Interstate Commerce Commission and the United States* v. *L. & N. R. R. Co.*, 57 L. Ed. 431; 227 U. S. 88, the Supreme Court said:

> "1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however, beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'. * * *

2. The government's claim is not only opposed to the ruling in *Interstate Commerce Commission* v. *Union P. R. Co.*, 222 U. S. 547; 56 L. Ed. 311; 32 Sup. Ct. Rep. 108, and the cases there cited, but is contrary to the terms of the act to regulate commerce, which in its present form provides (25 Stat. at L. 861, Sec. 6, Chap. 382, U. S. Comp. Stat., 1901, p. 3168), for methods of procedure before the Commission that 'conduce to justice'. The statute instead of making its orders conclusive against a direct attack, expressly declares that they may 'be suspended or set aside by a court of competent jurisdiction'. 36 Stat., at L. 551, Sec. 12, Chap. 309. Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law—are all matters within the scope of judicial power."

And on page 434, the court said:

"As these contentions of the government must be overruled, it is necessary to examine the record with a view of determining whether there was substantial evidence to support the order."

The late Judge Baker, in *St. Louis, I. M. & S. Ry. Co.* v. *U. S., et al.*, 217 Fed. Rep. 80, said:

"But in Interstate Commerce cases, as in all other cases, it is always a question of law whether there is evidence on which the finding can legally be based."

In *U. S.* v. *Louisiana & P. R. Co., et al.*, 58 L. Ed., 1185, the court held that the correctness of the conclu-

sions of the Commission can be tested as matters of law. In that case the court, at page 1193, said:

> "It is further insisted upon the authority of *Procter & G. Co.* v. *United States*, 225 U. S. 282, 56 L. Ed. 1091, 32 Sup. Ct. Rep. 761, and other cases in this court which have followed that decision, that in the present cases the decision rests upon conclusions of the Commission as to matters of fact only, which are within the sole jurisdiction of that body, and not reviewable in the courts. But we shall consider the case upon the findings of fact preceding this opinion, which are identical with those made by the Commission, and test the conclusions reached as matters of law, giving proper consideration to matters of fact which are not in dispute."

The facts upon which the order is based are set forth in the finding and report of the Commission, copied *verbatim* herein under our "Statement of the Case". There is no dispute with respect to the facts as set forth in the findings and report of the Commission, but appellants' claim that the conclusions stated in the report with respect to discrimination existing are contrary to and not supported by the specific facts found.

II.

THE ORDER OF THE COMMISSION IS CONTRARY TO AND NOT SUSTAINED BY THE UNDISPUTED FACTS.

(a) *Unlawful discrimination cannot exist unless there is a physical connection by the carrier alleged to be guilty of the discrimination with the railroad or shipper claiming to be discriminated against, or a service being performed for the railroad or shipper discriminated against through the medium of joint routes or joint rates.*

The order of the Commission under attack is purely and solely a discrimination order, based upon the con-

clusion that the South Shore Line and its shippers are subjected to unjust discrimination and undue prejudice by reason of the fact that appellants switch interstate carload traffic for each other at Michigan City, Indiana, and refuse to switch interstate carload traffic moving over the South Shore Line to and from Michigan City, and the order requires the appellants herein to cease and desist and to abstain from the unjust discrimination and undue prejudice so found in the report of the Commission. The order permits this to be done either by entering into switching arrangements with the South Shore or by cancelling and annulling the present switching arrangements which appellants have with each other.

The court will see from the report of the Commission that it waived aside the contentions of these appellants that their terminals could not be opened up and their business diverted to the South Shore Line unless there was a public necessity therefor, or it was in the public interest to do so, but, under what we believe to have been a misapprehension of the law, the Commission made a discrimination order. Of course, the question of whether or not an unlawful discrimination exists does not depend upon the question of public necessity or public convenience, but our position is that under the undisputed facts, there can be no unlawful discrimination, and these appellants can be required to open up their terminals and interchange cars and perform reciprocal switching with the South Shore Line, only by a finding supported by substantial evidence that there is a public necessity therefor, or it is in the public interest to do so. There is no contention here that a public necessity exists for interchanging cars with the South Shore Line. If there was such necessity, and the Commission did so find in an appropriate proceeding, there is no question as to its power and authority to order the service to be

performed, but the order in this case is in the alternative,—it is a discrimination order requiring appellants to either interchange traffic with the South Shore or stop interchanging traffic with each other.

The undisputed facts, as shown by the Commission's report and finding, are that neither the Monon, the Michigan Central nor the Pere Marquette connect with the South Shore Line, and neither of these roads switch traffic to or from the South Shore Line. In its order the Commission not only finds that discrimination exists by reason of the refusal to enter into reciprocal switching arrangements with the South Shore, but also in the refusal "to switch interstate carload traffic over complainant's line (the South Shore) to or from Michigan City, Indiana, while contemporaneously switching interstate carload traffic for each other at that point." (Rec., 30.) The Lake Erie road has a physical connection with the South Shore, and interchanges traffic with it by reason of the decision of the Commission in *C. L. S. & S. B. Ry. Co.* v. *Director General*, 58 I. C. C. 647. The Lake Erie connects directly with the Monon and the Michigan Central. The Monon connects with the Pere Marquette, Lake Erie and Michigan Central, and acts as an intermediate line for the interchange of traffic between points on the Pere Marquette on the one hand, and points on the Lake Erie and the Michigan Central on the other. The Lake Erie and Michigan Central do not connect with the Pere Marquette. The map attached to the petition filed in the lower court (Rec., 30), and the map attached to the answer of the South Shore (Rec., 52), both show the location of the roads at Michigan City.

While the map shows that the Monon crosses the South Shore at Michigan City, it does not connect with the South Shore, and the Commission so found. In the case of *C. I. & L. Ry. Co.* v. *Public Service Commission*,

121 N. E. 276, 188 Ind. 334, the South Shore sought a physical connection with the Monon. The Supreme Court held that no public necessity had been shown therefor, and an order requiring the construction of such a connection was set aside.

We feel it is important to bear in mind that the discrimination which the Commission finds was not in connection with a charge for services rendered, but in the refusal to render a service. We earnestly contend that as a matter of law, there can be no discrimination against the South Shore and its shippers by either the Pere Marquette, the Monon or the Michigan Central, because these carriers do not come in contact with the South Shore, nor have any joint arrangement with it and the intermediate line of the Lake Erie and Western, whereby they serve the South Shore and its shippers. There is neither service being performed by these three carriers in connection with the South Shore, nor a physical contact with the South Shore by these three carriers, and therefore, an ability to perform the service.

This proposition was squarely decided by the late and eminent Judge Baker, in the case of *St. Louis, I. M. & S. Ry. Co., et al.*, v. *United States,* 217 Fed. Rep. 80. The order attacked in that case was entered in a proceeding before the Commission, wherein the merchants of Metropolis, Illinois, were petitioners, and a score of railroads were respondents. The petitioners asserted that the railroad rates from south and southwest lumber territory to Metropolis, were wrongful in two respects: First, that the rates in themselves were excessive; and second, that the rates exhibited an undue preference in favor of Cairo, Illinois, and undue discrimination against Metropolis. The Commission found that the first charge was without basis in fact, and based its order wholly on

the ground of discrimination. The court, in holding that there could be no discrimination, said:

"(3) Against neither of the complainants in this cause was there evidence before the Commission which could legally support a charge of discrimination on its part. The railroad of neither complainant touches Metropolis. Each has a 16-cent rate over its own rails from points of origin in Southwestern lumber territory to Cairo. This Cairo rate, the record shows, was an abnormally low rate, forced upon these complainants by competition of other trunk lines. Neither of the complainants joins with any other railroad in making a through route and a through rate to Metropolis. When lumber reaches Cairo over the line of either of the complainants, the shipper pays 16 cents per hundredweight, which is a rate that the Commission has not found excessive for that service. If the lumber is to go beyond complainants' lines at Cairo and is destined to Metropolis, it must be carried on the independent line of the Illinois Central, and the shipper must pay therefor 6 cents per hundredweight, which the Commission has not found to be an excessive charge for that service. *How can it be said on this basis of fact that either of the complainants is discriminating against Metropolis? How can anyone discriminate against another whom he does not serve and with whom he does not come in contact? We believe that, as a matter of law, the charge of discrimination cannot be brought by a locality against any railroad that does not serve that locality, either directly by its own route or by a joint arrangement with other railroads for a through route and a joint rate.*" (Our italics.)

So in this case, how can it be said that the Pere Marquette, which does not come in contact with the South Shore, does not have any through routes or rates in effect with the South Shore, and does not in any manner serve that line, is unjustly discriminating against it? The same language applies to the Monon and the Michigan Central. These roads cannot discriminate against

a road that they do not reach by their own rails or serve through the medium of through routes and rates. There are two principal kinds of discrimination. Discrimination in the amount of the charge for a like and contemporaneous service (Section 2 of the Interstate Commerce Act), and discrimination in failing to render a service under like and similar circumstances and conditions. (Section 3 of the Interstate Commerce Act.) In order for the first kind of discrimination to exist, it is, of course, apparent that there must actually be a service being rendered. The Commission expressly found that the Michigan Central, Pere Marquette and Monon do not switch cars to or from the South Shore, so there is no discrimination in the amount of the charge and no violation of Section 2. In order for the second kind of discrimination to exist, there must be a contact between the railroad of the carrier charged with the discrimination, and the railroad or industry alleged to be discriminated against. This must necessarily be so, because the railroad which practices a discrimination, must by itself be able to remove the discrimination which its own act brings about. If the discrimination exists by reason of a service rendered one shipper which is withheld from another, the railroad must be in a position to stop rendering the service to the favored shipper, or extending the service to the shipper discriminated against. If, in order to extend the service, the railroad must enter into an arrangement with another railroad to act as an intermediate line, the power of the railroad to remove the alleged discrimination would depend on its ability to contract with a third party, the intermediate line. The Commission has found that the Lake Erie & Western is interchanging with the South Shore by reason of an order made by it in a prior case. The report of the Commission conclusively shows

that the Lake Erie & Western Railroad is not in any way discriminating against the South Shore or its shippers. Still, under the order of the Commission in this case, in order for the Pere Marquette, the Monon or the Michigan Central to extend their service to the South Shore Line, and in that manner remove the alleged discrimination, they would necessarily be compelled to enter into a satisfactory arrangement with the Lake Erie & Western Railroad,—an absolutely innocent party,—for the switching of the traffic over its road as an intermediate line. This, we believe, illustrates the point that unlawful discrimination cannot exist unless there is physical contact with the railroad or shippers claiming to be discriminated against, or a service being performed for them through the medium of joint routes or joint rates.

It is true that the Monon acts as an intermedite carrier between the Pere Marquette on the one hand, and the Michigan Central and the Lake Erie & Western on the other. But because the Monon has entered into this arrangement, furnishes no ground whatever for compelling the Lake Erie & Western to act as an intermediate carrier between the South Shore and the other three railroads at Michigan City, under the guise that it is necessary in order to remove something which cannot, under the facts, exist, to-wit: an unlawful discrimination. The defendant will probably contend that inasmuch as the Pere Marquette connects with the Monon, and the Monon connects with the Michigan Central and the Lake Erie & Western, that there is a contact with the South Shore through the medium of the Lake Erie & Western, but the fallacy of a contention of this kind is clearly apparent when we consider that any railroad in the United States is connected with any other railroad through the medium of the intervening carriers.

Section 15 of the Interstate Commerce Act authorizes the Commission to establish through routes, joint classifications and rates, divisions, and operating conditions whenever deemed by it to be necessary or desirable in the public interest and after a full hearing upon a complaint.

(Acts Feb. 4, 1887, c. 104, s. 15, 24 Stat. 384; June 29, 1906, c. 3591, s. 4, 34 Stat. 589; June 18, 1910, c. 309, s. 12, 36 Stat. 551; Aug. 9, 1917, c. 50, s. 4, 40 Stat. 272; Feb. 28, 1920, c. 91, ss. 418-421, 41 Stat. 484, 487, 488.)

Paragraph 4 of Section 3 of the Interstate Commerce Act authorizes the Commission, if it finds it to be in the public interest and to be practicable without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, to require the use of such terminal facilities by another carrier.

Under the Interstate Commerce Act, the Commission undoubtedly has power to require a carrier to extend its switching service, *upon a finding that there is a public necessity therefor or it is in the public interest to do so.*

But the fact that several railroads enter into arrangements for handling or switching traffic over their respective lines, and thereby serve a public necessity, cannot be made the basis for a charge of discrimination by a railroad with which they do not connect, or by shippers whom they do not reach, in order that such railroads may be forced to enter into additional contracts or arrangements with other railroads for extending their service. We reiterate, that inasmuch as the Monon, the Pere Marquette and the Michigan Central do not come in contact with the South Shore or serve its patrons, that there

can be no discrimination against that line or its patrons, and the service of these carriers can be extended to the South Shore and its shippers only upon a finding that there is a public necessity therefor or it is reasonably necessary in the public interest.

In this connection it is pertinent to note the following statement by Judge Baker in the case above referred to:

> "In a civil case against a number of defendants, or in a criminal indictment against numerous defendants, a judgment cannot be permitted to stand against a certain defendant, if there is no evidence against him, merely because there may be evidence which would support the judgment against other defendants. And so we believe that, as a matter of law, an order of the Interstate Commerce Commission must be supported by evidence which is sufficient to warrant a finding separately against each railroad named in the order."

In the case of *St. Louis, Southwestern R. Co., et al.*, v. *United States*, 38 Sup. Ct. Rep. 49, 245 U. S. 136, this court recognized the contention we are making here. In that case the court, at page 52, said:

> "Carriers insist also that the order is void on the ground, that since their 'rails do not reach Paducah, they cannot be guilty of discrimination against that city'. They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And thereby, they become effective instruments of discrimination."

The case of *Central R. Co. of New Jersey, et al.*, v. *United States, et al.*, 42 Sup. Ct. Rep. 80, 257 U. S. 247, is an interesting case on the subject of discrimination, and in our opinion is decisive of the question under consideration. That was a suit to enjoin the enforcement of an order of the Interstate Commerce Commission on the ground that it exceeded the powers of the Commission, was arbitrary and void. The order of the Commission

was entered upon a petition of the American Creosoting Company against 23 carriers, which alleged that the petitioner had a creosoting plant at Newark, N. J., which was connected by switching tracks with the Central and the Pennsylvania; that these carriers had failed to establish the privilege known as creosoting in transit; that this failure was unjust and unreasonable in violation of Section 1 of the Act to Regulate Commerce, and that it was also unjustly discriminatory in violation of Section 3. The Commission found that failure to establish the transit privilege was not unjust or unreasonable, and denied relief under Section 1. But it found that the failure subjected the company to unjust discrimination; and, granting relief under Section 3, the Commission directed that the discrimination be removed. The court, at page 83, said:

> "It is urged that, while the undue prejudice found results directly from the individual acts of Southern and Midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under Section 3 to remove discrimination so practiced. See *St. Louis & Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 144, 38 Sup. Ct. 49, 62 L. Ed. 199. But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination, as where a lower joint rate is given to one locality than to another similarly situated. *Penn. Refining Co.* v. *Western N. Y. & P. R. R. Co.,* 208 U. S. 208, 221, 222, 225, 28 Sup. Ct. 268, 52 L. Ed. 456. Compare *East Tennessee, Virginia & Georgia Ry. Co.* v. *Interstate Commerce Commission,* 181 U. S. 1, 18, 21 Sup. Ct. 516, 45 L. Ed. 719. If this were not so, the legality or

illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices or the cancellation of all joint rates could afford to carriers the assurance that they were not in some way violating the provisions of Section 3. What Congress sought to prevent by that section as originally enacted was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of Section 3."

We call the court's particular attention to the last two sentences in the above quotation, which so clearly show the original and unchanged purpose and scope of Section 3. How can the facilities and privileges which the Monon, the Pere Marquette and the Michigan Central furnish to the shippers located on their respective rails at Michigan City be made the basis for a charge of discrimination against the South Shore and its shippers, which are not reached or served by these three railroads and which, so far as these three petitioners are concerned, are in a different locality? So far as the Lake Erie & Western is concerned, it was made a party to the case before the Commission, not because it was in any manner discriminating against the South Shore or its shippers, but because it was a connecting line between the South Shore and the other three defendants in that case. Here we have two localities, the locality being served by the South Shore, on the one hand, and the locality being served by the Pere Marquette, the Monon and the Michigan Central, on the other. Inasmuch as the same carriers do not serve or reach both localities, the privileges and facilities which the steam carriers furnish in their locality, cannot subject those carriers to a charge of discrimination by the other locality.

In every case, so far as we have been able to discover, where a discrimination order of the Commission has been upheld by the courts, the railroad practicing such discrimination has come in actual contact with the party or locality discriminated against, or has actually served such locality or party by reason of its being a party to a combination of joint routes or rates. This is a fundamental proposition and a most vital one. If the commission can lawfully find that a carrier is discriminating against a locality or another carrier that it does not serve or come in contact with, then a carrier's service can be extended and its terminals opened up to other carriers, regardless of the question of public convenience or public necessity, and its business can be made the prey of any electric line or steam railroad under the guise of a discrimination order. In this connection it is pertinent to call attention to the following paragraph in the Commission's report:

> "Defendants maintain that this proceeding is merely an attempt by the South Shore to obtain from them traffic which they are now handling satisfactorily. Complainant's general manager admitted, practically without qualification, that the steam roads were serving their industries adequately at the time of hearing and that the electric line wished to divide the business. Most of the traffic tranported by the South Shore to Michigan City consists of coal, lumber and other commodities received from the Illinois Central, with which it connects at Kensington and with which it has joint rates. The South Shore tracks parallel the Michigan Central tracks between Michigan City and Kensington, at which point they are but 25 feet apart. Both lines serve Gary and Hammond, Ind., which are the principal stations between Chicago and Michigan City."

For answer to the proposition we have just argued, the appellees will doubtless cite and rely upon the case of *United States et al.* v. *Pennsylvania R. Co.*, 45 Su-

preme Court Reporter 43. That case grew out of a discrimination order entered by the Commission in *Manufacturers' Association of York* v. *Pennsylvania R. Co.*, 73 I. C. C. 40. The Pennsylvania brought suit to set the order aside and the lower court held that the order was erroneous and should be enjoined and suspended. (*Pennsylvania R. Co.* v. *United States*, 295 Federal 523.) On appeal to this honorable court, the judgment of the lower court was reversed. An examination of the facts set out in these three decisions discloses that they are entirely different from the facts in this case. In the York case, the carriers guilty of the discrimination, the Pennsylvania and the Western Maryland Railroad, by an arrangement between themselves, were each permitted to, and did, pass over the road of the other with its own locomotives and attached cars, in order to make deliveries to and accept shipments from plants located on spurs directly connected only with the road of the other carrier. In this case, neither of the appellants operate its engines over the tracks of any other of the appellants.

In the York case, the Interstate Commerce Commission expressly found that "the Pennsylvania and Western Maryland extend to each other the use of certain portions of their tracks for the purpose of rendering a service to shippers which is refused to other shippers substantially similarly located adjacent to their lines within the same community. The agreement here provides for the transfer of traffic and is not a trackage agreement." (73 I. C. C. Reports 40-45.)

The discrimination in the York case was in rendering a service to certain shippers adjacent to the lines of the two carriers practicing the discrimination, and in refusing to render the service to other shippers adjacent to their lines and similarly located. This is perfectly clear from the concluding paragraph in the Commission's

finding (73 I. C. C. 50-51), where the Commission found that the practice of the Pennsylvania and Western Maryland "is unduly preferential of shippers within the zone and subjects shippers *on their lines* without the zone to undue prejudice and disadvantage." It will be seen that in the above case, the shippers discriminated against were actually located on the lines of the carriers practicing the discrimination. There was actual contact between the two. The joint arrangement or agreement to render preferred service to a few of their shippers located within a particular zone worked to the disadvantage and prejudice of other shippers on these railroads, located without the zone. There was the duty on each carrier to serve its shippers indiscriminately, and there was the prohibition on each carrier to refrain from giving one of its shippers an undue preference over another of its shippers.

In this case the persons whom the Commission find are discriminated against are not located upon, or adjacent to the lines of the Pere Marquette, Monon or Michigan Central; they are not served in any manner by these lines, and these lines do not reach or come in contact with them, and there is no joint arrangement with the Lake Erie and Western for serving them.

(b) *The circumstances and conditions are dissimilar, and for that reason the order of the Commission is unlawful.*

The legal proposition is clear and indisputable that in order for a discrimination order to be valid, it must be supported by evidence showing that the persons discriminated against can be served under conditions and circumstances like and similar to the conditions and circumstances surrounding the persons whom it is claimed are receiving a preference or advantage.

The Interstate Commerce Commission has itself repeatedly recognized this proposition. In the matter of the Investigation and Suspension of Advances in Demurrage Charges, etc., 25 I. C. C. 315, 323, the Interstate Commerce Commission stated: "Clearly the circumstances and conditions connected with the service rendered must be taken into consideration in determining what is undue or unreasonable preference or advantage under Section 3 of the Act."

In the case of *United States* v. *Oregon R. R. and Navigation Co.*, 159 Fed. 975, the court, at page 979, says:

> "It is essential, therefore, in the consideration of whether there has been discrimination, or undue or unreasonable preference given or suffered, to find, as a basis for the inquiry, whether the attending conditions and circumstances affecting the respective shippers, and the service required and demanded, are substantially the same; that is to say, whether there is to 'be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions.' If it be so ascertained, then the investigation can proceed, for the standard of comparison and estimate is then present, and it may be further ascertained whether the competing shipper is being discriminated against. But if the contrary appears, there is an end of the investigation, for there can be no discrimination where there is no proper basis of comparison as to the services required."

In the case of *Seaboard Air Line et al.* v. *United State et al.*, 41 Sup. Ct. Rep. 24, the court, in speaking of Section 2 of the Interstate Commerce Act, said:

> "The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions."

In the case of *Central R. Co. of New Jersey et al.* v. *United States et al.*, 42 Sup. Ct. Rep. 80, this court, in

speaking of the provisions of Section 3 of the Interstate Commerce Act, at p. 83, said:

> "What Congress sought to prevent by that section as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act of 1920, Feb. 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of Section 3."

The Commission has recognized this principle in this case, as appears from the following statement in its report:

> "The question before us is whether the circumstances surrounding complainant and its traffic are so dissimilar as to justify the present difference in treatment."

The following facts, which are found in the Commission's report, in our opinion, clearly show that the circumstances and conditions surrounding the South Shore Electric Line and its shippers, and the steam roads and their shippers at Michigan City, are so dissimilar as to render the discrimination order of the Commission unlawful and void.

1. The Monon has a direct physical connection with the Lake Erie, the Pere Marquette and the Michigan Central. It does not connect with the South Shore. So far as it is concerned, therefore, the fact that it connects directly with each of the roads with which it performs reciprocal switching and does not connect with the South Shore, clearly shows a dissimilarity in circumstances and conditions.

The Michigan Central has a physical connection with the Lake Erie and the Monon. It does not connect with the South Shore. So far as its interchange arrangements are concerned, the circumstances and conditions are not the same or similar.

The Pere Marquette connects with the Monon, and by using the Monon as an intermediate carrier, interchanges traffic with the Lake Erie, and the Michigan Central. It cannot interchange traffic with the South Shore by virtue alone of its connection with the Monon, and its use of the Monon as an intermediate line. So that, the conditions under which it interchanges traffic are entirely dissimilar.

The Lake Erie does not act as an intermediate carrier at all under the present arrangements, whereas, in interchanging with the South Shore, it would be required to act as an intermediate carrier between the South Shore on the one hand, and the Monon and Michigan Central on the other, and both it and the Monon would be required to act as intermediate carriers between the South Shore on the one hand, and the Pere Marquette on the other.

2. The South Shore's terminal facilities at Michigan City are extremely limited and inadequate to handle a large volume of business. The appellants have large and extensive terminal facilities at Michigan City, which are sufficient to handle a large amount of traffic and they actually originate and also deliver a large amount of traffic by means of these terminal facilities.

3. The South Shore has only 36 freight cars, the same number it had at the time of the hearing in *C. L. S. & S. B. Ry. Co.* v. *Director General*, 58 I. C. C. 647, decided August 4, 1920, whereas, early in 1922, the freight equipment available on the Michigan Central was 34,518 cars, and 5,254 cars on the Lake Erie.

4. There are only three industries located on the line of the South Shore at Michigan City. Two of these have practically no outbound tonnage. One of these two was located on the Lake Erie rails until December, 1921;

the other is located on the Monon, as well as the South Shore. The Monon track beside its coal bins, is only 50 or 60 feet from its warehouse. The third industry is located but a short distance from the Lake Erie tracks, and could avail itself of its service, and thereby the services of all of the appellants herein, if it cared to do so. There are 60 industries located on the lines of the appellants at Michigan City. During three months in 1920, the Michigan Central had 2,073 outbound carloads of freight from Michigan City, and in the same three months in 1921, 1,112 cars. During three months of 1920, the outbound tonnage on the Monon amounted to 300 cars.

5. The appellants not only perform valuable services for each other at Michigan City, but also perform reciprocal switching at other points, and the South Shore is not able to perform any reciprocal switching at any other point, and only inconsequential service at Michigan City.

6. The report of the Commission shows that the appellants originate a large amount of business at Michigan City, and deliver a large amount of freight at said point. While the evidence is not in the record, it is clear from the Commission's report that the three industries on the South Shore Line originate but very little outbound traffic, and we feel that the report fairly supports the assumption that the South Shore Line neither delivers to nor originates at Michigan City, any substantial amount of traffic, which could possibly be interchanged with these appellants. On the other hand, the report shows that if appellants were required to interchange traffic with the South Shore at Michigan City, the South Shore could secure a large amount of traffic that appellants are now satisfactorily handling. In fact,

the report shows that this is the purpose of the complaint before the Commission.

Appellants fully realize that they must use their existing facilities impartially, but earnestly urge that under the circumstances and conditions set out in the Commission's report, they cannot be required to cease interchanging traffic between themselves at Michigan City, or extend their facilities to another part of Michigan City. They cannot comply with the order of the Commission by ceasing to interchange traffic between themselves, because there is a public necessity for such interchange. They should not be required to comply with the order by extending their service to the South Shore and its three shippers, which extension of service would necessarily have to be made over the line of the intermediate carrier, the Lake Erie.

It is pertinent to the questions we have been discussing to refer to the fact that discrimination, under the third section of the Interstate Commerce Act, to be undue and unlawful, must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the party alleged to be favored. The Commission has so held many times.

In *Portsmouth Association of Commerce* v. *S. A. L. Ry. Co.*, 55 I. C. C. Rep. 377, the Commission, at page 380, said:

> "The complaints, in so far as they allege a violation of Section 3 of the act to regulate commerce, can be disposed of in comparatively small compass. Under this section it is clear that the prejudice to be undue and lawful must ordinarily be such that it is a source of advantage to the party alleged to be favored and a disadvantage to the other party; and that generally a competitive relation between the parties must appear. *California Walnut Growers Assn.* v. *A. & R. R. R. Co.*, 50 I. C. C. 558."

See also, *Interstate Commerce Commission* v. *C. Gt. W. R. Co.*, 52 L. Ed. 705, 209 U. S. 106.

With respect to the alleged discrimination against the South Shore line, how can it be said that the interchange of traffic between petitioners herein is in any manner prejudicial to the South Shore line? If the petitioners herein cease and desist from interchanging traffic between themselves, the South Shore line will be in exactly the same position as it was when its complaint was filed. It will not be able to secure one additional carload of traffic because it does not reach or serve, or come in contact with the industries located on petitioners' lines.

The following portion of the opinion of the Supreme Court in *Central R. Co. of New Jersey et al.* v. *United States et al.*, 42 Sup. Ct. Rep. 80, 82, 257 U. S. 247, is pertinent here:

> "It is insisted that the order leaves appellants the alternative of withdrawing from the tariffs which establish joint rates with the Southern and Midwestern carriers through Newark. The order does not so provide in terms; and in fact the alleged alternative is illusory. The undue prejudice found arises not from the existence of joint rates, but from conditions local to other railroads. Cancellation of the joint rates would not change those conditions. Although the joint rates were withdrawn, the established through routes would remain. The duty to provide such routes is specifically enjoined by paragraph 4 of Section 1 (Comp. St., Sec. 8563), and, under the provisions of paragraph 1 of Section 6 (Section 8569), the separately established rates of the several connecting carriers would, in the absence of joint rates, apply to through transportation. So far as appears, the Newark concern would be under the same disadvantage as compared with its competitors, whether the traffic moved on the combination of the rates local to the several lines or on joint rates. Even the abolition of the through routes (which is not suggested) would leave the relative positions of the several creosoting concerns

unchanged. Cancellation of the joint rates would, at most, relieve appellants from the charge that they are violating the provisions of Section 3."

With respect to the alleged discrimination against the shippers on the South Shore Line, this case presents the curious amomaly of the South Shore Line claiming that a preference and advantage is given to the shippers on the lines of appellants, whereas, the Commission, in its report, states:

> "Six shippers located on the rails of the Monon, Michigan Central and Pere Marquette testified that they have used the South Shore for less-than-carload traffic and have received very efficient and expeditious service, in many instances superior to that of the steam roads. If reciprocal switching arrangements were in effect and if the carload service were as good as the less-than-carload service they would divert a portion of their carload traffic from the steam lines to the South Shore. The service rendered by the steam lines has, on the whole, been satisfactory during the past year. Several shippers located on defendants' lines at Michigan City, including some of the largest shippers of both inbound and outbound freight, testified that the service afforded by the steam lines is entirely adequate, and that they would not be benefited by the establishment of the reciprocal switching arrangements with the electric line."

Where is the preference and undue advantage when the preferred shippers go on record as being in favor of extending the service so as to remove the alleged discrimination? Certainly the alleged preference cannot be very advantageous to them. This but illustrates our contention that the facts and circumstances in this case, as disclosed by the report and findings of the Commission, do not give rise to a discrimination finding or order at all, but that the whole question relates to an extension of service and the creation of new routes, and that these appellants can be required to extend their service over

the line of the Lake Erie, so as to reach the South Shore and its shippers, and upon such new routes, only upon a finding that there is a public necessity therefor, or it is in the public interest to do so.

III.

THE ORDER OF THE COMMISSION DEPRIVES THESE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION, AND IS, THEREFORE, UNLAWFUL.

From the report of the Commission it appears that the South Shore is an electric line approximately 76 miles long, closely paralleling the line of the Michigan Central between Michigan City, Indiana, and Kensington, Illinois; that the railroads of appellants reach and serve every locality reached by the line of the South Shore; that appellants originate at and handle into Michigan City a large volume of business; that the South Shore originates but little business at Michigan City; that appellants have large and extensive terminal facilities at Michigan City, and serve 60 industries at that point. And the Commission specifically found that the general manager of the South Shore, at the hearing, admitted practically without qualification that appellants were serving their industries adequately at the time of the hearing, and that the South Shore line wished to divide the business.

No one would seriously contend that appellants can comply with the Commission's order by ceasing to interchange traffic between themselves. It is clear that that would be contrary to the public interest and public necessity. So that, the only way appellants can comply with the order is by extending their service so as to reach the South Shore. We submit that the only fair conclu-

sion that can be drawn from the Commission's report is that the real purpose of the complaint filed with the Commission by the South Shore against these appellants was not to remove a discrimination, but to secure a division of the business which appellants are adequately handling. We feel that this conclusion is amply borne out by the record before this court, and that from such record this court is fully justified in concluding as a matter of law that a compliance with the order of the Commission will not result in the removal of any unjust discrimination, but the sole and only effect of such compliance will be to divide the business of these appellants with the South Shore Line.

In our opinion, the following cases support our contention that under the facts and circumstances in this case, the order of the Commission should be set aside.

In *L. & N. R. R. Co.* v. *Central Stock Yards,* 53 L. Ed. 441, 212 U. S. 132, this court passed upon a provision of the Kentucky constitution requiring one carrier to receive and deliver on its terminal cars from another carrier engaged in like business where the receiving carrier had not participated in the line haul. The receiving carrier refused to surrender the use of its terminals to its competitor for such delivery service. The following is quoted from p. 145 of the opinion of this court in that case:

> "If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus, by a competing road, for the purpose of reaching and using its terminal station. To require such an acceptance from a railroad is to

take its property, in a very effective sense, and cannot be justified unless the railroad holds that property subject to greater liabilities than those incident to its calling alone."

New York Harbor case, 47 I. C. C. 643-722.

Cincinnati & Columbus Traction Co. v. *B. & O. S. W. R. R. Co.*, 20 I. C. C. 486.

Blakely So. R. R. Co. v. *A. C. L. R. R. Co.*, 26 I. C. C. 344, 350.

In the case of *Chicago, Indianapolis and Louisville R. Co.* v. *Public Service Commission*, 121 N. E. 276, 188 Ind. 334, 338, 339, the South Shore Line sought a physical connection with the Monon at Michigan City. The Supreme Court of Indiana at pages 338-339, said:

"This court has recently decided that the law does not contemplate that orders of this kind will be made for the purpose of aiding or assisting one carrier as against another in its competition for business."

In the case of *Indiana Harbor Belt Railroad Co.* v. *Public Service Commission*, 187 Ind. 660, wherein the South Shore sought a physical connection with the Indiana Harbor Belt R. Co., the court at page 667, said:

"The power granted to the Commission to enforce compulsory joint rates as to connecting carriers was not intended to be exercised for the purpose of aiding one carrier as against others in its competition for business."

IV.

THE RECORD SHOWS THAT NO SATISFACTORY EVIDENCE WAS INTRODUCED BEFORE THE COMMISSION TO SHOW THAT THE SOUTH SHORE IS SUCH A COMMON CARRIER AS COMES WITHIN THE PROVISIONS OF THE INTERSTATE COMMERCE ACT.

It is a grave question as to whether or not the South Shore line is included within the term "common carriers by railroad," as that expression is used in paragraph 3

of Section 15 of the Interstate Commerce Act, as amended. (Act. Feb. 28, 1920, c. 91—Sections 418, 421, 41 Stat. 484, 487, 488.) It is there provided:

> "The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character."

The effect of the Commission's order in this case is to require appellants to establish the practice of reciprocal switching with the South Shore, and to establish rates and charges covering such switching. The South Shore is an electric line, and if it is not engaged or being operated in accordance with the above provisions, the Commission is without jurisdiction to enter an order of this kind.

This court has held that the Commission's jurisdiction to prevent unjust discrimination by interurban electric railroads against interstate commerce is not limited by the above provision.

> *U. S. et al.* v. *Village of Hubbard, Ohio*, 45 Sup. Ct. Rep. 160.

Here, however, the electric line is the party claiming to be discriminated against, and we feel that the burden was upon it to bring itself clearly within the above provision of Section 15.

The report of the Commission indicates that while it has assumed that the South Shore is a comomn carrier within the meaning of the Interstate Commerce Act, it does not do so by reason of any evidence introduced at the hearing before it. With respect to this question the Commission, in its report, states:

> "Defendants, citing *Village of Hubbard, Ohio*, v. *United States*, 278 Fed. 754, contend that complain-

ant is not a common carrier within the meaning of the Interstate Commerce Act. We specifically found that it was engaged in the general transportation of freight in Indiana passenger Fares of C. L. S. & S. B. Ry. Co., 69 I. C. C. 180, and this record does not refute that finding."

We suggest that the above statement shows that the conclusion of the Commission was not based upon any evidence introduced at the hearing before it, but is a result of a decision which the Commission rendered at some previous time. We submit that a finding of facts made by the Commission several years before, and in another case, is not evidence in this case. This court has recently held that in a proceeding of this kind before the Commission, nothing can be treated as evidence which is not introduced as such.

United States et al. v. *Abilene & S. R. Co.*, 44 Sup. Ct. Rep. 565.

See also:

Interstate Commerce Commission v. *L. & N.*, 227 U. S. 88, 33 Sup. Ct. Rep. 185.

The burden was upon the complaining South Shore Company to bring itself squarely within the provisions of the Interstate Commerce Act upon which its suit was based, and, in our opinion, the record shows that it did not satisfactorily do so.

Conclusion.

For the reasons herein stated the judgment of the District Court denying the application for an interlocutory injunction should be reversed and the case remanded with directions to grant the prayer for relief contained in the petition.

Respectfully submitted,

William L. Taylor,
C. C. Hine,
Counsel for Appellants.

1422 Transportation Building,
Chicago, Illinois.

October 28th, 1925.

APPENDIX.

Sections 2 and 3 of the Interstate Commerce Act, as amended, are as follows:

"Sec. 2. (As amended February 28, 1920.) That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (Acts Feb. 4, 1887, c. 104, s. 2, 24 Stat. 379; Feb. 28, 1920, c. 91, s. 404, 41 Stat. 479.)

Sec. 3. (As amended February 28, 1920.) (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(2) From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may

from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: *Provided*, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any state or territory or political subdivision thereof, or for the District of Columbia.

(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the cariers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed

is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be." (Acts Feb. 4, 1887, c. 104, s. 3, 24 Stat. 380; Feb. 28, 1920, c. 91, s. 405, 41 Stat. 479.)

Paragraphs 3 and 4 of Section 15 of the Interstate Commerce Act, as amended, are as follows:

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

(4) In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water

line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: Provided, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest." (Acts Feb. 4, 1887, c. 104, s. 15, 24 Stat. 384; June 29, 1906, c. 3591, s. 4, 34 Stat. 589; June 18, 1910, c. 309, s. 12, 36 Stat. 551; Aug. 9, 1917, c. 50, s. 4, 40 Stat. 272; Feb. 28, 1920, c. 91, ss. 418-421, 41 Stat. 484, 487, 488.)

CONTENTS

CASES CITED

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 150

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY Company, The Michigan Central Railroad Company, The New York, Chicago and St. Louis Railroad Company (successor by consolidation to the Lake Erie and Western Railroad Company), and The Pere Marquette Railway Company, appellants

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE Commission, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES

OPINIONS

Circuit Judge Alschuler and District Judges Anderson and Lindley denied application for interlocutory injunction without opinion (R. 62). The Interstate Commerce Commission report is *Chicago, Lake Shore & South Bend Railway* v. *Lake Erie & Western Railway, et al.*, 88 I. C. C. 525.

JURISDICTION

The suit was commenced and the appeal was taken under Commerce Court Act, 36 Stat. 539, and Urgent Deficiencies Act, 38 Stat. 219, 220. The latter provides, "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction * * *."

STATEMENT

The controversy before the Commission was between carriers which operate in the Michigan City switching district. (R. 11, 23.) Chicago Lake Shore & South Bend (South Shore) was the complainant before the Commission; and Michigan Central, Chicago, Indianapolis & Louisville (Monon), Pere Marquette, and Lake Erie & Western were the defendants.

The South Shore, an electric line of 76 miles operating between South Bend, Ind., and Kensington, Ill., a point within the corporate limits of Chicago, complained to the Commission of the refusal of the steam railroads operating in Michigan City switching district to enter into reciprocal switching arrangements with South Shore while maintaining such relations with each other. The Michigan City Chamber of Commerce and the Manufacturers' Club of Michigan City intervened in support of the complaint. (R. 22.)

The South Shore was fully described and its status defined in *Chicago, Lake Shore & South*

Bend Railway v. *Director General,* 58 I. C. C. 647.

South Shore has connection and interchange facilities with the Lake Erie & Western only. The Lake Erie & Western directly connects with the Michigan Central and the Monon. (R. 22.) The Monon connects with the Pere Marquette, Lake Erie & Western, and Michigan Central, and acts as an intermediate line for the interchange of freight between points on Pere Marquette, on the one hand, and points on Lake Erie & Western and Michigan Central on the other. (R. 22.) Lake Erie & Western and Michigan Central do not connect with Pere Marquette, and Michigan Central, Pere Marquette and Monon do not connect with South Shore. (R. 22.)

The switching charges and practices of the various roads operating in the switching district are set out in the report. (R. 23.) Lake Erie & Western is necessarily an intermediate carrier of traffic which may move between the line of South Shore and the lines of the other three. (R. 23.)

Lake Erie & Western has entered into reciprocal switching arrangements with South Shore. (R. 23.) Its interchange switching charges between its connections with Michigan Central, Monon, or South Shore, are $3.60 to certain industries on its line, and $6.30 to certain other industries. It does not publish an intermediate switching charge applicable on traffic between its connection with the South Shore and its connections with

the Michigan Central and the Monon. (R. 23.) The Michigan Central, Pere Marquette, and Monon tariffs make no provision for reciprocal switching with the South Shore. (R. 24.)

The proceeding before the Commission sought to compel Michigan Central, Pere Marquette and Monon to enter into reciprocal switching arrangements with the South Shore, upon the same terms and conditions as exist between those lines. (R. 23.)

The terminals of Michigan Central, Lake Erie & Western, Pere Marquette, and Monon are open except to the South Shore. (R. 27.) Except the Lake Erie & Western, the rail carriers do not switch traffic to industries on the South Shore, or from the South Shore to industries located on their rails. (R. 24.) There are three industries located on South Shore's line at Michigan City, two of which have practically no outbound tonnage and their inbound consists chiefly of coal, ice, and groceries. (R. 24.) One is located on both South Shore and Monon. There are about 60 industries located on the other lines. (R. 24.)

Witnesses for the industries testified it would be to their advantage if the South Shore had reciprocal switching arrangements with all the steam lines at Michigan City. (R. 24–25.) Six shippers located on the rails of the Monon, Michigan Central, and Pere Marquette testified that they have used the South Shore for less-than-carload traffic and have received very efficient and expeditious serv-

ice, in many instances superior to that of the steam roads. (R. 25.) If reciprocal switching arrangements were in effect and if the carload service were as good as the less-than-carload service they would divert a portion of their carload traffic from the steam lines to the South Shore. (R. 25.) The service rendered by the steam lines has on the whole been satisfactory during the past year. (R. 25.)

During 1921, when reciprocal switching arrangements were in effect between Lake Erie & Western and South Shore, the latter handled into Michigan City 162 cars which were switched to industries on Lake Erie & Western; of this number 29 cars were consigned to South Shore's power house prior to October, and during the remainder of the year 72 cars were switched to a company distinct from the South Shore which had leased its power house. Thus, 101 of the total of 162 cars were loaded with coal for the power house which prior to October was controlled by South Shore. In the same year South Shore switched 17 cars to industries on its line from Lake Erie & Western. (R. 25.)

The establishment of reciprocal switching from or to the South Shore to or from Pere Marquette would require three interchanges, and to or from the Michigan Central or Monon two interchanges. (R. 27.) Under the existing reciprocal switching arrangements between the steam lines only the movements between the Pere Marquette and the Lake Erie & Western or Michigan Central require two interchanges. (R. 27.)

The fact that the Lake Erie & Western will be required, if reciprocal switching is maintained, to act as an intermediate carrier of traffic to or from South Shore is an accident of location and not a transportation difference. (R. 28.) In length of haul or use of intermediate line the situation of the South Shore with respect to the Michigan Central or the Monon is clearly not dissimilar from the situation of the Pere Marquette with respect to the Michigan Central or the Lake Erie & Western. (R. 28.) Nor is the fact controlling that three interchanges and a somewhat longer intermediate haul may be required on traffic to or from Pere Marquette. Each carrier holds itself out to switch practically all traffic of any other carrier, regardless of the length of the switching haul or point of origin or destination of shipment. The contemporaneous refusal to switch traffic of South Shore is a denial to it of reasonable, proper, and equal facilities for the interchange of traffic. (R. 28.)

The order (R. 30) directs the carriers operating in the Michigan City switching district to cease and desist, on or before July 24, 1924, and thereafter to abstain, from the unjust discrimination and undue prejudice found in said report to result from their refusal to switch interstate carload traffic moving over South Shore's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and from their failure and refusal to enter into arrangements for the performance of reciprocal

switching of interstate carload traffic in connection with complainant at Michigan City, Ind., upon relatively reasonable terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at that point.

Assailing the validity of the order as beyond the power of the commission, appellants filed the petition. (R. 1.) Answers were filed by the Government (R. 56) and the Commission (R. 53). The South Shore intervened (R. 33) and filed an answer in support of the order (R. 35). Michigan City Chamber of Commerce and Manufacturers Club of Michigan City also filed a joint petition for intervention in support of the order. (R. 51.)

STATUTES

Section 404 of the Transportation Act of 1920 (41 Stat. 479) amended Section 2 of the act to regulate commerce (24 Stat. 379), so that Section 2 now provides:

> That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the

provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (41 Stat. 479.)

Section 405 of the Transportation Act of 1920 (41 Stat. 479) amended Section 3 of the act to regulate commerce (24 Stat. 380), so that Section 3 now provides:

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, or corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (24 Stat. 380.)

* * * * *

All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or prop-

erty to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper. (41 Stat. 479.)

Section 418 of the Transportation Act of 1920 (41 Stat. 484) amended Section 15 of the Act to regulate commerce (24 Stat. 384), so that Section 15 now provides:

> That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the tranmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this

Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter ob-observed in such case or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulations, or practice is or will be just, fair, and reasonable, to be thereafter followed and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

QUESTION

Does the effect of the noninclusion of the South Shore in the arrangements entered into for reciprocal switching of interstate carload traffic by the carriers operating in the Michigan City switching district constitute, under the findings of the Commission, the unjust discrimination and undue prejudice condemned by the Statute?

ARGUMENT

SUMMARY

I. Chicago, Lake Shore & South Bend Railway Company is a common carrier subject to the Interstate Commerce Act and entitled to all of the benefits and advantages it may derive therefrom. 58 I. C. C. 647; 69 I. C. C. 180; *United States* v. *Village of Hubbard; United States* v. *City of Wellsville,* 266 U. S. 474.

II. To open their terminals to each other and close them to the South Shore in their arrangements for the performance of reciprocal switching, the carriers operating in the Michigan City switching district have practiced unjust discrimination and undue prejudice against South Shore and its traffic. *United States* v. *Pennsylvania Railroad,* 266 U. S. 191; *Louisville & Nashville Railroad* v. *United States,* 238 U. S. 1; *Seaboard Air Line Railway* v. *United States,* 254 U. S. 57; *Pennsylvania Company* v. *United States,* 236 U. S. 351; *Los Angeles Switching Case,* 234 U. S. 294.

III. The order does not require carriers "to extend or curtail their facilities, or to submit to enlarged use of their terminals," an argument overruled in York Switching Case, *United States* v. *Pennsylvania Railroad,* 266 U. S. 191, 197. But see, *Louisville & Nashville Railroad* v. *United States,* 242 U. S. 60.

IV. The argument that unlawful discrimination cannot exist unless there is a physical connection by the carrier alleged to be guilty of the discrimination

with the railroad or shipper claimed to be discriminated against was overruled in *St. Louis Southwestern Railway* v. *United States,* 245 U. S. 136, and the latter decision was not impaired by the subsequent decision in *Central Railroad* v. *United States,* 257 U. S. 247, 259.

V. In the absence of the evidence before the Commission the only question to be considered is whether the findings on their face support the order. *Louisiana & Pine Bluff Railway* v. *United States,* 257 U. S. 114.

I

THE NONINCLUSION OF THE SOUTH SHORE IN THE ARRANGEMENTS ENTERED INTO FOR RECIPROCAL SWITCHING OF INTERSTATE CARLOAD TRAFFIC BY THE CARRIERS OPERATING IN THE MICHIGAN CITY SWITCHING DISTRICT CONSTITUTES, UNDER THE FINDINGS OF THE COMMISSION, THE UNJUST DISCRIMINATION AND UNDUE PREJUDICE CONDEMNED BY THE STATUTE

(A) THE SOUTH SHORE IS A COMMON CARRIER SUBJECT TO THE INTERSTATE COMMERCE ACT

In their brief (p. 48) the faint contention is made that the South Shore is not included within the term "common carriers by railroad." The status of the South Shore was fully defined in *Chicago, Lake Shore & South Bend Railway* v. *Director General,* 58 I. C. C. 647. Its president testified that there has been no important change in the construction or operation of its lines since that decision. (R. 22.)

It does not appear that the prior report and order of the Commission which adjudged that the

South Shore was such a common carrier was ever questioned by any carrier operating in the Michigan City switching district; nor is there any charge or averment in the petition that the South Shore is not such a common carrier; nor was such a question raised before and passed upon by the District Court when the application for injunction was denied, at least no error is assigned on such a ruling. Moreover, the question is foreclosed by the decision in the recent cases of *United States* v. *Village of Hubbard* and *United States* v. *City of Wellsville,* 266 U. S. 474.

(B) THE ORDER DOES NOT REQUIRE CARRIERS TO EXTEND OR CURTAIL THEIR FACILITIES OR TO SUBMIT TO ENLARGED USE OF THEIR TERMINALS

No claim is made by the carriers operating in the Michigan City switching district that the order, directly or indirectly, compels them to surrender to the South Shore the use, in any respect whatsoever, of their terminals or any part thereof. The order merely directs that those carriers shall extend to the South Shore the same reciprocal switching or interchange facilities that they extend to each other, and merely admits the South Shore to the reciprocal switching or interchange facilities which now exist, the only change wrought being that such facilities shall be accorded to five carriers instead of four. The situation in this case is unlike that which was presented in *Louisville & Nashville Railroad* v. *United States,* 242 U. S. 60.

(C) THE ORDER AND THE FINDINGS UPON WHICH IT IS BASED ARE SUBSTANTIALLY SIMILAR TO THOSE IN OTHER CASES

In its report (R. 28) the Commission found, "In length of haul or use of intermediate line the situation of the South Shore with respect to the Michigan Central or the Monon is clearly not dissimilar from the situation of the Pere Marquette with respect to the Michigan Central or the Lake Erie & Western. Nor is the fact controlling that three interchanges and a somewhat longer intermediate haul may be required on traffic to or from the Pere Marquette. Each defendant holds itself out to switch practically all traffic of any other defendant, regardless of the length of the switching haul or point of origin or destination of shipment. The contemporaneous refusal to switch traffic for complainant is a denial to it of reasonable, proper, and equal facilities for the interchange of traffic."

In the absence of the evidence before the Commission this finding must be accepted as true. *Louisiana & Pine Bluff Railway* v. *United States,* 257 U. S. 114.

In *Pennsylvania Co.* v. *United States,* 236 U. S. 351, this Court affirmed the decree of the District Court, 214 Fed. Rep. 445, which denied motion for interlocutory injunction against the order of the Commission in *Buffalo, Rochester & Pittsburgh Railway* v. *Pennsylvania Co.,* 29 I. C. C. 114, cited by the Commission in the instant case. (R. 28.) In

delivering the opinion of the Court, Mr. Justice Day said (p. 371):

> So here there is no attempt to appropriate the terminals of the Pennsylvania Company to the use of the Rochester Company. What is here accomplished is only that the same transportation facilities which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and the Rochester Company, shall be rendered to the Rochester Company as are given to the Baltimore & Ohio Company under precisely the same circumstances of connection for the transportation of interstate traffic. All that the Commission ordered was that the Company desist from the discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation, and that the District Court was right in so determining.

In *Seaboard Airline Railway* v. *United States,* 254 U. S. 57, this Court affirmed the decree of the District Court, 249 Fed. Rep. 368, which denied application for injunction and dismissed the petition, in the suit to enjoin the order of the Commission in *Richmond Chamber of Commerce* v. *Seaboard Airline,* 44 I. C. C. 455, also cited by the Commission in the instant case. (R. 28.) In delivering the opinion of the Court Mr. Justice Day said (p. 62):

> We are of opinion that the Commission was correct in regarding the service

in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of law in *Wight* v. *United States*, 167 U. S. 512, and *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services.

Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Pre-Cooling Case*, 232 U. S. 199; *Los Angeles Switching Case*, 234 U. S. 294, 311, 312, and cases cited; *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361.

The Commission did not hold that switching charges must be always the same. But it did hold that they must be alike where the service was rendered under substantially similar circumstances and conditions.

On April 2, 1924, the order sought to be enjoined was entered by the Commission. (R. 21.) On June 24, 1924, the petition for injunction was filed in the District Court. On July 8, 1924, the application for interlocutory injunction was denied and the order allowing the appeal was entered on the same day. On August 1, 1924, the record was filed in this Court.

In *United States* v. *Pennsylvania Railroad*, 266 U. S. 191, the arguments were made before this Court in October, 1924, and the decision was announced on November 17, 1924. Thus, the *York Switching Case* had not been decided by this Court when the Commission entered its order and the District Court denied application for interlocutory injunction. In affirming the decree of the District Court in the *York Switching Case,* Mr. Justice Brandeis said (p. 199):

> The Commission has found, not merely that the facilities in question were granted to some and refused to others, but that the grant and refusal have, by reason of the use made and intended to be made of the facilities, resulted in undue prejudice. It is true that an extension of trackage rights, an enlarged common use of terminals, or the establishment of through routes and joint rates, or the withdrawal of any of them, could not be ordered except upon the findings and conditions prescribed in the act. But the order complained of does not require any such thing. It requires only that the carriers shall desist from a practice which involves

such use as has resulted and will result in the undue prejudice found. The order leaves them free to remove the discrimination by any appropriate action. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624; *United States* v. *Illinois Central R. R. Co.,* 263 U. S. 515, 521. To accomplish this, it is not necessary that the Pennsylvania should grant to the other carriers the extensive use of the terminal facilities and tracks which was sought, and which the Commission found was not shown to be in the public interest. Compare *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 368; *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1, 20.

(D) IT IS NOT NECESSARY THAT THE TRACK OF SOUTH SHORE SHALL PHYSICALLY CONNECT WITH THE TRACK OF EACH OF THE OTHER CARRIERS

Opposing counsel argue at length that, under the decision in *Central Railroad* v. *United States,* 257 U. S. 247, the order of the Commission may not stand because the track of the South Shore does not physically connect with the track of each of the other carriers and, therefore, the charge of unjust discrimination and undue prejudice is unfounded.

In *St. Louis Southwestern Railway* v. *United States,* 245 U. S. 136, that argument was vigorously pressed and squarely overruled. In delivering the opinion of the Court, Mr. Justice Brandeis said (p. 144):

> Carriers insist also that the order is void on the ground that, since their " rails do not reach Paducah, they cannot be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose " rails " reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra.*

In *Central Railroad* v. *United States,* 257 U. S. 247, this Court said nothing which impaired the foregoing language; on the contrary, the Court cited the *St. Louis Southwestern case* with approval. In delivering the opinion, Mr. Justice Brandeis said (p. 259):

> It is urged that, while the undue prejudice found results directly from the individual acts of southern and midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of

course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under Section 3 to remove discrimination so practiced. See *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144.

(E) THE FACT THAT THE SOUTH SHORE MAY ACQUIRE TRAFFIC WHICH THE APPELLANTS ARE NOW HANDLING AND THAT THE ACQUISITION OF SUCH TRAFFIC WAS THE PURPOSE OF THE COMPLAINT DOES NOT RENDER THE ORDER NULL AND VOID

In *United States* v. *Illinois Central Railroad*, 263 U. S. 515, this Court, again speaking through Mr. Justice Brandeis, and again citing *St. Louis Southwestern Railway* v. *United States*, 245 U. S. 136, with approval, said (p. 523):

> The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate.

CONCLUSION

The decree of the District Court was correct and should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

JANUARY 2, 1926.

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SUBJECT INDEX

TABLE OF CASES CITED

70648—25——1

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 150

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY Company, The Michigan Central Railroad Company, The New York, Chicago & St. Louis Railroad Company, and The Pere Marquette Railway Company, appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE Commission, and the Chicago, Lake Shore & South Bend Railway Company, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA

BRIEF FOR INTERSTATE COMMERCE COMMISSION

OPINION OF THE COURT BELOW

There was no written or reported opinion of the court below.

STATEMENT OF THE CASE

This is an appeal under the Act of October 22, 1913 (38 Stat. L. 208, 220), from a decree of the District Court for the District of Indiana, consisting of Circuit Judge Alschuler and District Judges

Anderson and Lindley, denying an application by four steam railroads for an interlocutory injunction to set aside an order of the Interstate Commerce Commission requiring them to remove unjust discrimination and undue prejudice found by the Commission to exist in their refusal to interchange traffic with an electric railroad at Michigan City, Ind., and to enter into reciprocal switching arrangements with it while at the same time interchanging traffic and having reciprocal switching arrangements with each other at that point.

The four steam railroads, appellants herein, are Chicago, Indianapolis & Louisville Railroad Company, The Michigan Central Railroad Company, The New York, Chicago & St. Louis Railroad Company, successor by consolidation to the railroad of the Lake Erie & Western Railroad Company, and The Pere Marquette Railway Company. These for convenience will be referred to, respectively, as the Monon, the Michigan Central, the Lake Erie & Western, and the Pere Marquette. The Michigan Central and the Pere Marquette operate railroads extending from Chicago through Michigan City to points east thereof, while the Monon and the Lake Erie & Western operate lines extending southward from Michigan City to points in other states. (R. 1, 2.)

The electric railroad is the Chicago, Lake Shore & South Bend Railway Company, referred to herein as the South Shore. This railroad is about 76 miles long and extends from Kensington, with-

in the corporate limits of Chicago, Ill., through Michigan City to South Bend, Ind. (R. 22.) It connects with the Illinois Central Railroad at Kensington and has with that road joint rates and through routes under which the electric line handles a large part of its traffic to Michigan City. (R. 25, 26.) There it connects with the Lake Erie & Western, but has no direct physical connection with the other three steam railroads. Traffic between the South Shore and the Monon or the Michigan Central must be switched at Michigan City over the Lake Erie & Western as an intermediate line, and traffic between the South Shore and the Pere Marquette must be switched there over both the Lake Erie & Western and the Monon as intermediate lines. (R. 22.) The location of the electric line, the steam railroads, and their points of connection is indicated on the map attached as Exhibit D to the petition. (R. 31.)

PROCEEDINGS BEFORE THE COMMISSION

Originally the South Shore had no arrangements for the interchange of traffic or for reciprocal switching with any of the steam lines at Michigan City. However, in a proceeding which antedated the one in which the order here under consideration was entered, the Commission, upon complaint of the South Shore, "directed the Lake Erie & Western to enter into reciprocal switching arrangements at Michigan City with the South Shore to the same extent and upon the same terms and

conditions as those upon which it participates in such an arrangement at that point in connection with the Pere Marquette or the Monon." *Chicago, L. S. & S. B. Ry. Co.* v. *Director* General, 58 I. C. C. 647. (R. 23.) The Lake Erie & Western thereupon entered into reciprocal switching arrangements with the South Shore as to traffic to or from its own line, but did not handle any traffic between the South Shore on the one hand and the other steam railroads at Michigan City on the other. The other steam roads were not parties to this order (58 I. C. C. 647, 650) and refused to interchange traffic or establish reciprocal switching arrangements with the South Shore in that city. (R. 23.)

The proceeding which resulted in the order here under consideration arose upon complaint of the South Shore against the practice of the steam roads in thus refusing to switch traffic and establish reciprocal switching arrangements with it while switching traffic for, and having such arrangements with, each other at Michigan City. The four steam railroads, appellants herein, were made parties defendant to the proceeding. The Michigan City Chamber of Commerce and the Manufacturers' Club of Michigan City intervened in support of the complaint. (R. 22.) A full hearing was held, briefs were filed, and the case was orally argued. (R. 55.) On April 2, 1924, the Commission, by Division 3, made its report (R. 21) and entered its order (R. 30) in the proceeding. *Chi-*

cago, L. S. & S. B. Ry. Co. v. *L. E. & W.*, 88 I. C. C. 525.

The report. In the report the Commission described the location of appellants' lines with respect to the South Shore, as follows:

> At Michigan City the South Shore has a connection and interchange facilities with the Lake Erie & Western. The Lake Erie & Western also connects directly with the Monon and the Michigan Central. The Monon connects with the Pere Marquette, Lake Erie & Western, and Michigan Central, and acts as an intermediate line for the interchange of freight between points on the Pere Marquette on the one hand and points on the Lake Erie & Western and the Michigan Central on the other. The Lake Erie & Western and Michigan Central do not connect with the Pere Marquette, and the Michigan Central, Pere Marquette, and Monon do not connect with the South Shore. * * * (R. 22.)
>
> The establishment of reciprocal switching from or to the South Shore to or from the Pere Marquette would require three interchanges, and to or from the Michigan Central or the Monon, two interchanges. Under the existing reciprocal switching arrangements between the steam lines, only the movements between the Pere Marquette and the Lake Erie & Western or the Michigan Central require two interchanges. * * * (R. 27.)

The intermediate switching distance between the rails of the South Shore and the rails of the Pere Marquette is, as the Commission found, 3.88 miles; between the rails of the South Shore and the rails of the Michigan Central, 1.38 miles; and between the rails of the South Shore and the rails of the Monon, 1.76 miles. In contrast with this it found the intermediate switching distance between the rails of the Lake Erie & Western and the Pere Marquette to be 2.12 miles, and between the rails of the Michigan Central and the Pere Marquette 0.49 miles when delivery is to the Michigan Central and 1.36 miles when delivery is to the Pere Marquette. (R. 27, 28.)

With respect to the industries located at Michigan City the Commission said:

> There are three industries located on complainant's line at Michigan City and about 60 industries located on the lines of defendants. Two of the industries on the South Shore have practically no outbound tonnage and their inbound freight consists chiefly of coal, ice, and groceries. One of these was located on the Lake Erie & Western rails until December, 1921. The other is located on the Monon as well as on the South Shore, and receives groceries by the electric line and coal via the Monon. The Monon track beside the coal bins is from 50 to 60 feet from the warehouse. These industries compete with industries on the steam roads. The third industry receives and ships in carload and less-than-carload quantities. It is

located on the South Shore a short distance from the point where that line is intersected by the Lake Erie & Western tracks. It was formerly served by the Lake Erie & Western, whose right of way extends to the fence inclosing the industry's property.

Witnesses for the above industries testified that it would be to their advantage if the South Shore had reciprocal switching arrangements with all the steam lines at Michigan City. Under the present arrangement they are required to receive traffic transported to Michigan City by the Michigan Central and Pere Marquette on the steam tracks of those roads, and in some instances above referred to they have been required to pay an additional switching charge. Six shippers located on the rails of the Monon, Michigan Central, and Pere Marquette testified that they have used the South Shore for less-than-carload traffic and have received very efficient and expeditious service, in many instances superior to that of the steam roads. If reciprocal switching arrangements were in effect and if the carload service were as good as the less-than-carload service they would divert a portion of their carload traffic from the steam lines to the South Shore. The service rendered by the steam lines has, on the whole, been satisfactory during the past year. Several shippers located on defendants' lines at Michigan City, including some of the largest shippers of both inbound and outbound freight, testified that the service afforded by the

> steam lines is entirely adequate, and that they would not be benefited by the establishment of the reciprocal switching arrangements with the electric line. (R. 24, 25.)

Concerning the refusal of appellants to accord to the South Shore the treatment which they gave to each other in respect to switching, the Commission said:

> Defendants, except the Lake Erie & Western, do not switch traffic to industries on the South Shore or from the South Shore to industries located on their rails. * * * Company material consigned to the South Shore is switched over the defendants' lines and the charges are absorbed because the South Shore is named as an industry in the defendants' tariffs. (R. 24.)

The Lake Erie & Western, as previously indicated, established, under a prior order of the Commission, reciprocal switching arrangements with the South Shore in respect to traffic to or from its own line, but did not handle traffic between the South Shore and the other steam lines. As to the latter traffic the Lake Erie & Western " is necessarily an intermediate carrier." It can not " because of its location act as an intermediate carrier between any of the steam roads at Michigan City." (R. 23.) In dealing with this situation the Commission said:

> The fact that the Lake Erie & Western will be required, if reciprocal switching is maintained, to act as an intermediate car-

> rier of traffic to or from complainant's line is an accident of location and not a transportation difference. In length of haul or use of intermediate line the situation of the South Shore with respect to the Michigan Central or the Monon is clearly not dissimilar from the situation of the Pere Marquette with respect to the Michigan Central or the Lake Erie—Western. Nor is the fact controlling that three interchanges and a somewhat longer intermediate haul may be required on traffic to or from the Pere Marquette. Each defendant holds itself out to switch practically all traffic of any other defendant, regardless of the length of the switching haul or point of origin or destination of shipment. The contemporaneous refusal to switch traffic for complainant is a denial to it of reasonable, proper, and equal facilities for the interchange of traffic. (R. 28.)

The Commission sets forth in the report the charges published by the steam lines and the South Shore for switching at Michigan City, and describes the tariff provisions under which appellants absorb switching charges for each other and not for the South Shore. (R. 23.) As to these the Commission said:

> Defendants' switching charges and absorptions differ in amount. The measure of the switching charges is not in issue. (R. 28.)

The manner in which absorption should be made under the order was illustrated as follows:

> * * * if defendants continue the absorption of switching charges at Michigan City and the Monon [for example] can reach any industry on any other defendant's rails by a maximum absorption of $6.30 per car, removal of the unjust discrimination against industries on complainant's lines would not require the absorption of a greater amount on traffic destined to or originated at such industries. (R. 29.)

The ultimate finding of unjust discrimination and undue prejudice follows:

> We find that the refusal of defendants to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and the failure and refusal of the defendants to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant upon relatively reasonable terms, based upon a careful consideration of the similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in such arrangements with each other at that point, subjects complainant and its shippers to unjust discrimination and undue prejudice which will be ordered removed. (R. 29.)

The order. The pertinent provisions of the order entered by the Commission read as follows:

> It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before July 24, 1924, and thereafter to abstain from the unjust discrimination and undue prejudice found in said report to result from their refusal to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point and from their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant at Michigan City, Ind., upon relatively reasonable terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at that point.
>
> It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before July 24, 1924, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid unjust discrimination and undue prejudice.

> And it is further ordered, That this order shall continue in force until the further order of the commission. (R. 30.)

Soon after this order was entered the four steam railroads, appellants herein, petitioned the Commission for a reargument before the full Commission. On June 17, 1924, this petition was denied. (R. 5.)

PROCEEDINGS IN THE LOWER COURT

On June 24, 1924, the four steam railroads, appellants herein, filed a petition in the court below praying for an interlocutory injunction, and upon final hearing a permanent injunction, to set aside the order. (R. 1.) The United States was made party defendant. The Interstate Commerce Commission and the South Shore intervened as defendants. All three filed answers. (R. 35, 53, 56.) The court, consisting of Hon. Samuel Alschuler, Circuit Judge, and Hon. Albert B. Anderson and Hon. Walter C. Lindley, District Judges, heard the case upon the "application for an interlocutory injunction and upon the pleadings, proceedings, and proofs herein filed on behalf of both parties and the intervenors," and on July 8, 1924, entered its decree denying the application. (R. 62.)

APPELLANTS' CONTENTIONS

The following four contentions are made in appellants' brief in this court:

> [1.] Unlawful discrimination can not exist unless there is a physical connection by

the carrier alleged to be guilty of the discrimination with the railroad or shipper claiming to be discriminated against, or a service being performed for the railroad or shipper discriminated against through the medium of joint routes or joint rates (p. 25).

[2.] The circumstances and conditions are dissimilar, and for that reason the order of the Commission is unlawful (p. 38).

[3.] The order of the Commission deprives these appellants of their property without due process of law, in violation of the fifth amendment to the Federal Constitution, and is, therefore, unlawful (p. 46).

[4.] The record shows that no satisfactory evidence was introduced before the Commission to show that the South Shore is such a common carrier as comes within the provisions of the Interstate Commerce Act (p. 48).

ARGUMENT

SUMMARY

I. The evidence shows that the South Shore is engaged in the transportation of property by railroad in interstate commerce and is therefore subject to the Interstate Commerce Act.

II. The Commission's findings of unjust discrimination and undue prejudice are amply supported by the evidence and are final.

1. Although three of appellants do not connect with the South Shore, they have arrangements with the Lake Erie & Western by which they reach it and are thus "effective instruments of discrimination."

2. The circumstances and conditions are similar.

III. The Commission's order requires merely the removal of discrimination and does not deprive appellants of their property without due process of law.

PERTINENT PROVISIONS OF THE STATUTE

Section 1, paragraph (1), of the interstate commerce act (24 Stat. L. 379; 41 Stat. L. 474) provides:

> (1) That the provisions of this act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad * * *

> from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia * * * or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation * * * takes place within the United States.

Section 2 and paragraphs (1) and (3) of section 3 of the act (24 Stat. L. 379, 380; 41 Stat. L. 479), which declare certain discriminations to be unlawful, read as follows:

> SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is

hereby prohibited and declared to be unlawful.

SEC. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsover, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(3) All carriers engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

Section 15, paragraph (1) (24 Stat. L. 384; 441 Stat. L. 484), authorizes the Commission, after hearing, to order the removal of unlawful discriminations found by it to exist under sections 2 and 3. The pertinent provisions of this paragraph read as follows:

SECTION 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * *, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge

so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

I. THE EVIDENCE SHOWS THAT THE SOUTH SHORE IS ENGAGED IN THE TRANSPORTATION OF PROPERTY BY RAILROAD IN INTERSTATE COMMERCE AND IS, THEREFORE, SUBJECT TO THE INTERSTATE COMMERCE ACT

The contention that the South Shore is not subject to the Interstate Commerce Act seems frivolous in view of the recent decision of this Court in *United States* v. *Village of Hubbard,* 266 U. S. 474. There it was held that the Commission, in the exercise of its power to require an increase in intrastate railway fares which subjected interstate commerce to unjust discrimination, had jurisdiction over two intrastate interurban electric railroads engaged in interstate commerce, irrespective of whether either was operated as part of a steam railway system, or engaged in the general transportation of freight in addition to its passenger and express business.

As indicated in that case the basis for the jurisdiction of the Commission over electric lines is to be found in section 1 of the interstate commerce act. Paragraph (1) of this section provides that this act " shall apply to common carriers engaged in (a) The transportation of passengers or property wholly by railroad " in interstate commerce. Section 15 (1), which, as shown above, authorizes the

Commission to order the removal of unlawful discrimination, and sections 2 and 3, which define such discrimination, apply to carriers "subject to * * * this act," without qualification or exception in respect of electric railroads. The only question then is whether the South Shore comes within the definition of common carrier in section 1, that is, whether it is engaged in the transportation of passengers or property wholly by railroad in interstate commerce.

The Commission found, among other things, that the South Shore " is an electric line approximately 76 miles long which operates between South Bend, Ind., and Kensington, Ill., a point within the corporate limits of the city of Chicago " (R. 22); and, again, " Most of the traffic transported by the South Shore to Michigan City consists of coal, lumber, and other commodities received from the Illinois Central, with which it connects at Kensington and with which it has joint rates." (R. 25.)

These facts, without referring to others found by the Commission, are sufficient to show that the South Shore is a common carrier engaged in the transportation of property by railroad in interstate commerce and hence is a carrier within the meaning of sections 1, 2, 3, and 15(1), the sections with which we are here concerned.

Appellants, however, suggest that a " grave question " is raised as to whether the South Shore comes within the provisions of section 15(3) (24 Stat. L.

384, 41 Stat. L. 485) authorizing the establishment of through routes, since the Commission is therein prohibited from establishing such routes—

> between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character.[1]

They contend in effect that no satisfactory evidence was introduced before the Commission to show that the South Shore was "engaged in the general business of transporting freight" and suggest that the statement in the report, "We specifically found that it was engaged in the general transportation of freight in *Indiana Passenger Fares of C. L. S. & S. B. Ry. Co.*, 69 I. C. C. 180, and this record does not refute that finding," shows that the Commission relied not upon evidence introduced at the hearing before it but upon a finding of facts made some years before in another case.

Aside from the fact that the order here under consideration was not made under section 15(3), the South Shore is not a "street electric passenger railway." On the contrary it is an interurban railroad which serves many communities, is con-

[1] The language quoted was introduced into the Act to Regulate Commerce, now the Interstate Commerce Act, in 1910 (36 Stat. L. 552), and was practically the same as that contained in the bill when it passed the House (H. R. 17536). The Senate substituted "street, suburban, or interurban electric passenger railways" for "street electric passenger railways." The bill as finally adopted, however, omitted "suburban or interurban" and thus showed the intent of Congress to include only "street railways" proper.

nected with the steam railroad transportation system of the country "so that freight may be shipped, without breaking bulk, across the continent," and is a well established channel of interstate commerce. *Omaha Street Ry.* v. *Int. Com. Comm.*, 230 U. S. 324, 336, 337; *Village of Hubbard Case*, 266 U. S. 474, 478. But even if it were a street railway, the findings above referred to show that it is in fact "engaged in the general business of transporting freight." In addition to these findings the Commission's report shows that one of the defendants, the Lake Erie & Western, has already entered into reciprocal switching arrangements with it at Michigan City and interchanges freight traffic with it there pursuant to the Commission's decision in 58 I. C. C. 647 (R. 23, 25); that "The South Shore was fully described and its status defined" in that decision (R. 22) which also clearly shows that it was engaged in the general business of transporting freight (R. 47); and that "Its President testified that there has been no important change in the construction or operation of its line since" then. (R. 22.) Under these circumstances, the Commission's reference to the later decision in 69 I. C. C. 180, was proper. But irrespective of this decision, the Commission's findings fully established its jurisdiction to grant relief to the South Shore, even on the theory that it was necessary to show that this carrier was "engaged in the general business of transporting freight," a theory which we believe to be erroneous.

II. THE COMMISSION'S FINDINGS OF UNJUST DISCRIMINATION AND UNDUE PREJUDICE ARE AMPLY SUPPORTED BY THE EVIDENCE AND ARE FINAL

Section 3 "forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact. * * * If the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it can not be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission." *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361. "The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions." *United States* v. *New River Co.,* 265 U. S. 533, 542.

Carriers are entitled to protection against unjust discrimination and undue prejudice as fully as any shipper. *Pennsylvania Co.* v. *United States, supra,* and *Chicago Junction case,* 264 U. S. 258, 267.

1. Although three of appellants do not connect with the South Shore, they have arrangements with the Lake Erie & Western by which they reach it and are thus "effective instruments of discrimination"

Apparently the principal contention made by appellants is "that as a matter of law there can be no discrimination against the South Shore and its

shippers by either the Pere Marquette, the Monon, or the Michigan Central, because these carriers do not come in contact with the South Shore, nor have any joint arrangement with it and the intermediate line of the Lake Erie & Western, whereby they serve the South Shore and its shippers." (Appellants' brief, p. 28.)

The Commission, it is true, has found that the Pere Marquette, the Monon, and the Michigan Central do not connect physically with the South Shore. However, it has found that there is already an arrangement between each of these carriers and the Lake Erie & Western, as an intermediate line, by which traffic is moved to and from the South Shore rails. The Commission, for example, pointed out in its report that " Company material consigned to the South Shore is switched over the defendants' [appellants'] line and the charges are absorbed because the South Shore is named as an industry in the defendants' tariffs." (R. 24.) The South Shore is thus within the switching district at Michigan City and through routes and arrangements are already in effect by which traffic will be delivered by appellants to it as an industry [2] although not to it as a carrier. Under these arrangements appel-

[2] From the standpoint of liability shipments delivered to it under the existing tariff arrangements are in legal contemplation delivered by the Pere Marquette, the Monon, and the Michigan Central, and they would be liable for damages as *delivering* carriers although the actual switching movements were performed by the Lake Erie & Western. *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.*, decided May 25, 1925, 268 U. S. 366.

lants reach the rails of the South Shore and are effective instruments of discrimination.

The Commission has found that the fact that the Lake Erie & Western must act as an intermediate carrier of traffic interchanged between the South Shore and the other three appellants is "not a transportation difference." (Rec. 28.) Certainly absence of physical connection and the necessity of a switching haul by an intermediate line are not criteria which appellants apply in interchanging traffic and performing services for each other. The Michigan Central interchanges traffic with the Pere Marquette and has reciprocal switching arrangements with it. Yet traffic between these lines must be switched by the Monon as an intermediate carrier. Likewise traffic between the Pere Marquette and the Lake Erie & Western must be switched by the Monon as an intermediate carrier.

The similarity of transportation services is illustrated by the fact that the Lake Erie & Western, under the existing reciprocal arrangements with the other appellants, will, as previously pointed out, switch traffic coming from their rails for delivery to the South Shore as an industry, but refuses to haul traffic over the identical rails and between the same points when for delivery to the South Shore for transportation by it beyond. Moreover, the Pere Marquette, the Monon, and the Michigan Central under these reciprocal arrangements will haul traffic to the rails of the Lake Erie & Western

for transportation by it to or past the South Shore rails, but refuse to haul such traffic over the same rails and for the same distances to the Lake Erie & Western when it is to be switched beyond to the South Shore for further transportation.

The facts before the Commission, we submit, presented a case for the exercise of the Commission's administrative judgment and discretion and its conclusion that there were no transportation differences warranting the unjust discrimination and undue prejudice found is conclusive. Absence of physical connection between the South Shore and three of appellants can not, as a matter of law, justify the discrimination practiced against the South Shore and its shippers. This, we believe, is settled by recent decisions of this court.

In *United States* v. *Ill. Cent. R. R.*, 263 U. S. 515, this court sustained an order of the Commission based upon a finding that the Illinois Central and the short line connecting with it at Fernwood, Miss., were guilty of unjust discrimination in maintaining from points on the Illinois Central, including Fernwood and points south thereof, to northern destinations, rates on lumber, which were lower than the rates contemporaneously maintained from points on the short line via Fernwood and the Illinois Central to the same destinations. It was held that the fact that the Illinois Central did not reach the prejudiced points on the short line or that the short line was not a party to the rates from the

favored points on the Illinois Central did not prevent the discrimination from being unlawful as found. In dealing with this question this court, in an opinion by Mr. Justice Brandeis, said at page 520:

> * * * By joining with the Illinois Central in establishing the prejudicial through rate from Knoxo the Fernwood & Gulf became as much a party to the discrimination practiced as if it had joined also in the lower rates to other points which are alleged to be unduly preferential. Compare *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 144. If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it. Moreover, it is not true that the Illinois Central can not remove the discrimination without the cooperation of the Fernwood & Gulf. The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood or by raising the rate from Fernwood or by giving both an intermediate rate. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624. The Illinois Central, acting alone, is in a position to raise the rate from Fernwood. For its main line extends from there to the Ohio River crossings, the rate-breaking point.

In dealing with a similar case in the same opinion the following language was used, page 527:

In No. 38, where the short line alone seeks to set aside the Commission's order, this additional fact requires mention. The rate to the short-line points is not a joint rate, but a combination of the trunk-line rate to the junction and the short-line local rate. The distinction is without legal significance in this connection. A through route was established, and the transportation is performed as the result of this arrangement between the carriers, expressed or implied. Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases.

The situation of the Pere Marquette, the Monon, and the Michigan Central is in each case comparable with that of the Illinois Central in the above case, while the situation of the Lake Erie & Western is similar to that of the short line. The Monon, for example, by the switching arrangement already in existence reaches the South Shore through the Lake Erie & Western as a switching line in the same manner in which the Illinois Central reached points on the short line in the case referred to. There, it is true, the question of rates was involved but the principle announced is applicable. The Monon in the illustration given actually participates in the denial of transportation to and from the South Shore while performing similar transportation for its immediate connections. More-

over, it can remove the discrimination without the cooperation of the Lake Erie & Western. This could be done by denying reciprocal switching to its direct connections, the other appellants.

In the *St. Louis Southwestern case,* 245 U. S. 136, *supra,* an order of the Commission was sustained which required certain carriers to establish and maintain through routes from various points in "blanket territory" in the southwest to Paducah, Ky., via either Memphis or Cairo, and joint rates not in excess of the rate then in effect to Cairo. The Commission had found a 22-cent rate to Paducah unreasonable to the extent that it exceeded a rate of 16 cents to Cairo and unduly preferential of the latter. Two of the three roads which attacked the order had "their own rails from the 'blanket territory' to Cairo but can reach Paducah only over a connecting line," i. e., the Illinois Central from Cairo or Memphis. The third road could reach both Cairo and Paducah only over the Illinois Central as a connecting line from Memphis to these points. In dealing with a contention similar to the one made here, this court, in an opinion by Mr. Justice Brandeis, said:

> *Second.* Carriers insist also that the order is void on the ground that, since their "rails do not reach Paducah, they can not be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah,

> although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra.* (p. 144.)

While it was stated in the opinion that the order "is not primarily an order to remove discrimination in violation of section 3," the language above quoted indicates that this court considered it sustainable under that section.

In *United States* v. *Pennsylvania Railroad Co.*, 266 U. S. 191, a finding by the Commission of unjust discrimination and undue prejudice by the Pennsylvania at York, Pa., was upheld, although that carrier contended that the favored industries served by it under trackage arrangements over the line of the Western Maryland were in legal contemplation on its own rails, while the industries found to have been prejudiced were not on its own rails but on those of the Western Maryland and were, therefore, so dissimilarly situated as to preclude, as a matter of law, such a finding.

See also *Union Pacific Railroad* v. *Updike Grain Co.*, 222 U. S. 215, involving discrimination in

allowances to elevators located on the carrier's own rails as contrasted with allowances by it to elevators on connecting lines.

Central Railroad Co. v. *United States,* 257 U. S. 247, relied upon by appellants, is clearly distinguishable from the present case and affords no basis for setting aside the order here involved. There the Commission had found that the Central Railroad was guilty of unlawful discrimination in refusing to accord shippers on its lines certain transit privileges in respect of creosoting lumber, which were accorded by that company's southern connections with which it had joint rates and through routes. The court held that the creosoting privilege was a purely local one and that the Central Company had not participated in granting it and hence could not be guilty of discrimination in refusing to accord it to shippers on its line. In a footnote to the opinion in the *Illinois Central Case,* 263 U. S. 515, 520, *supra,* the *Central Railroad Company case* was distinguished as follows:

> * * * In *Central R. R. Co. of New Jersey* v. *United States,* 257 U. S. 247, the creosoting privilege was not a part of the joint tariff. It was an item in the local tariff granted without the concurrence of the carriers before the Commission; and the revenues derived therefrom were not shared by them.

In the present case each of the appellants participated in the discrimination by refusing to trans-

port traffic from its line to or from that of the South Shore, while performing similar transportation for each other, and the practice complained of is not, as in the *Central Railroad case,* a matter of local concern which is beyond their lines and over which they have no control.

The principles laid down in the above decisions, when applied to the present case, fully sustain the order here under consideration.

2. The circumstances and conditions are similar

The absence of physical connection between three of appellants and the South Shore and the circumstance that the Lake Erie & Western acts as an intermediate carrier have already been discussed. These and the other circumstances and conditions to which appellants call attention, including differences in the extent of facilities available at Michigan City, the number of industries served, and reciprocal switching performed there and at other points, are all matters for the administrative judgment and discretion of the Commission. The fundamental fact is clear that appellants refused to interchange traffic or establish reciprocal switching arrangements with the South Shore at Michigan City, while interchanging traffic and having such arrangements with each other at that point. The report of the Commission shows that there was abundant evidence of the character of services involved, the points of connection, the switching distances, the arrangements for absorp-

tion of switching charges, the shippers on the South Shore and on appellants' lines in that city, and other circumstances and conditions attending the transportation granted and refused. The Commission's finding that the circumstances and conditions were similar and that there was unjust discrimination and undue prejudice is clearly supported by the evidence and is final.

As previously pointed out, " The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions." *United States* v. *New River Co.*, 265 U. S. 533, 542, *supra*. The Commission's " findings are fortified by presumptions of truth ' due to the judgment of a tribunal appointed by law and informed by experience.' " *Interstate Com. Com.* v. *C., R. I. & P. Ry.*, 218 U. S. 88, 110. Since in the present case appellants have not brought before this court the evidence which was before the Commission (*Edward Hines Trustees* v. *U. S.*, 263 U. S. 143, 148), but attack the order upon the findings in the report, and since the Commission is not required to make detailed findings of all the facts upon which it bases its conclusions (*Manufacturers Ry. Co.* v. *U. S.*, 246 U. S. 457, 487), the order could not be held to be invalid unless clearly contrary, as a matter of law, to the facts there set forth, and this has not been shown.

It is interesting to note the similarity between the facts in this case and those in *Buffalo, Roches-*

ter & Pittsburgh Ry. v *Pennsylvania Co.,* 29 I. C. C. 114, the Commission's order in which was sustained by this court in *Pennsylvania Co.* v. *United States,* 236 U. S. 351. There the Commission upon complaint of the Buffalo, Rochester & Pittsburgh found that the Pennsylvania subjected it to undue and unreasonable prejudice in refusing to accept from and to move to it carload lots of freight within the switching limits of New Castle, Pa., while performing this service for three other trunk lines serving New Castle and connecting there with the Pennsylvania. The Commission's order required the removal of this discrimination. The terminal facilities of the Pennsylvania were more extensive than those of the Buffalo, Rochester & Pittsburgh (29 I. C. C. 115) just as appellants' facilities in the present case were found to be more extensive than those of the South Shore (R. 26). The Pennsylvania had spur tracks reaching 26 industries within the switching limits (id. p. 115) as compared with 60, or an average of 15, reached by appellants in the present case (R. 24). The Rochester Company had only three industries on its line within those limits (id. p. 115) while the South Shore has the same number (R. 24). The Pennsylvania there contended, among other things, that the discrimination against the Buffalo, Rochester & Pittsburgh was justified because the three other trunk lines "are in position either at New Castle or elsewhere to offer it reciprocal advantages that are fully compensatory for the switch-

ing done for them in New Castle, whereas complainant is not in position to offer similar advantages by way of compensation at New Castle or elsewhere." (id., p. 117.) A similar contention is made in the present case and is disposed of by reference to the discussion in that case (R. 28). There the Commission in overruling the contention pointed out that if the discrimination could be justified—

> because of reciprocal services performed at other and distant places by some of the carriers having connection with its line at New Castle, it would then seem to be necessary to determine the extent and measure of those services performed at such other places by each carrier and the value thereof to the defendant, a manifestly futile undertaking involving indefinite, uncertain, and speculative and, as we think, irrelevant questions and considerations as to the value of this and that service and the varying cost of performing it at many and remote places, impossible of satisfactory and reliable determination. (Id. p. 118.)

It is to be observed that the amount of compensation is not involved in either case. (R. 28.)

The Commission's order in the present case should be sustained just as its order was in that case.

III. THE COMMISSION'S ORDER REQUIRES MERELY THE REMOVAL OF DISCRIMINATION AND DOES NOT DEPRIVE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW

The Commission's order requires appellants to remove unjust discrimination and undue prejudice

practiced by them against the South Shore and its shippers at Michigan City in respect to switching. The requirement is that only to the extent that appellants switch for and have reciprocal switching arrangements with each other, they shall switch for and enter into such arrangements with the South Shore. They are left free to remove the discrimination by any appropriate action and may, if they choose, do so by discontinuing the reciprocal arrangements which they now have with each other at Michigan City.

Appellants overlook the alternative character of the order when they assume " the only way appellants can comply with " it " is by extending their services so as to reach the South Shore." (Appellants' brief, p. 46.) There is no absolute requirement that their lines be extended under section 1 (21) or that use of their terminal facilities be granted under section 3 (4) or that through routes and joint rates be established under section 15 (3), and the order need not therefore be supported by findings provided for in those sections. (See Commission's report, Rec. 27.)

Appellants can not complain that their property is taken when they themselves offer their terminals for reciprocal switching for each other and are required merely to accord to the South Shore and its shippers the same treatment which they thus give to each other.

In *Pennsylvania Co.* v. *United States,* 236 U. S. 351, *supra,* this court, in stating the facts, said,

among other things, " The Pennsylvania Company refuses all interchange of carload freight, whether incoming or outgoing, with the Rochester road within the switching limits of New Castle; but it does conduct such interchange with the Erie, the Pittsburgh & Lake Erie, and the Baltimore & Ohio roads " (p. 359). " The Commission found this practice to be an undue and unreasonable discrimination against the Rochester Company, and made an order requiring the Pennsylvania Company to desist therefrom " (p. 360). The complaint by the Rochester Company had asked not only for the removal of the discrimination but for the establishment of through routes and rates between it and the Pennsylvania at New Castle. The Commission's order, however, required merely the removal of discrimination.

In holding that the order did not amount to an appropriation of the terminals of the Pennsylvania Company this court, speaking through Mr. Justice Day, said, among other things:

> So here there is no attempt to appropriate the terminals of the Pennsylvania Company to the use of the Rochester Company. What is here accomplished is only that the same transportation facilities which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and the Rochester Company shall be rendered to the Rochester Company as are given to the Baltimore & Ohio Company under precisely the same cir-

> cumstances of connection for the transportation of interstate traffic. All that the Commission ordered was that the Company desist from the discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation, and that the District Court was right in so determining. (P. 371.)

It is to be observed that the Pennsylvania had for some time maintained reciprocal switching arrangements at New Castle with the three preferred carriers under which for the years 1909, 1910, and 1911, for example, over 65,000 cars were switched for or by it. (29 I. C. C. 117.) There was, therefore, as much room for assuming in that case that the order did not contemplate a discontinuance of the existing switching arrangements and in reality required extension of services as there is for appellants' assumption in the present case. It is also to be observed that this court there held that *L. & N. R. R. Co.* v. *Central Stockyards,* 212 U. S. 132, relied upon by appellants in the present case, was not in point. (Pp. 369–371.) That was not a case under the Interstate Commerce Act and the facts were entirely different from those here under consideration.

In *Louisville & Nashville R. R.* v. *United States,* 238 U. S. 1, the Commission had found that it was unlawfully discriminatory for the Louisville & Nashville and the Nashville, Chattanooga & St. Louis to refuse to switch at Nashville coal and competitive business for the Tennessee Central while

switching for each other practically all traffic and for the Tennessee Central traffic other than coal and competitive business. In sustaining the Commission's order requiring the removal of this discrimination and holding that it was not unconstitutional, this court, speaking through Mr. Justice Lamar, pointed out that " the Commission is not dealing with an original proposition, but with a condition brought about by the Appellants themselves "; that " Having made the Yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of section 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities "; and that " Whatever may have been the rights of the carriers in the first instance * * * the Appellants can not open the Yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public. In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others " (pp. 18, 19). In the present case each of the appellants, as the Commission points out in its report, " holds itself out to switch practically all traffic of any other defendant, regardless of the length of the switching haul or point of origin or destination of the shipment." (R. 28.)

In *United States* v. *Pennsylvania Railroad,* 266 U. S. 191, *supra,* the Pennsylvania and the Western

Maryland had an arrangement by which within a certain zone at York, Pa., " each is permitted to * * * pass over the road of the other with its own locomotives and attached cars in order to make deliveries to and accept shipments from plants located on spurs directly connected only with the road of the other carrier. Industries within the zone thus get the same advantage over those without it [on these two roads], which would flow from an agreement for reciprocal free switching or for absorption of the switching charges which was limited to their traffic. The Commission found that, ' from the standpoint of carriage, the situation of industries inside and outside the zone is substantially similar '; and that the described practice ' subjects shippers * * * without the zone to undue prejudice and disadvantage " (pp. 196, 197). In upholding the Commission's order requiring the removal of this undue prejudice and disadvantage this court, in an opinion by Mr. Justice Brandeis, said, among other things:

> The Commission has found, not merely that the facilities in question were granted to some and refused to others, but that the grant and refusal have, by reason of the use made and intended to be made of the facilities, resulted in undue prejudice. It is true that an extension of trackage rights, an enlarged common use of terminals, or the establishment of through routes and joint rates, or the withdrawal of any of them, could not be ordered except upon the find-

> ings and conditions prescribed in the Act. But the order complained of does not require any such thing. It requires only that the carriers shall desist from a practice which involves such use as has resulted and will result in the undue prejudice found. The order leaves them free to remove the discrimination by any appropriate action. [Cases cited.] To accomplish this, it is not necessary that the Pennsylvania should grant to the other carriers the extensive use of the terminal facilities and tracks which was sought, and which the Commission found was not shown to be in the public interest (pp. 199, 200).

See also *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, in which an order of the Commission in respect to discrimination in the absorption of switching charges at Richmond, Va., was upheld.

The decisions above referred to clearly establish the statutory and constitutional authority of the Commission to do what it did in the present case.

CONCLUSION

"It is apparent from the legislative history of the act [to regulate commerce] that the evil of discrimination was the principal thing aimed at." *Houston & Texas Railway Co.* v. *United States,* 234 U. S. 342, 356. Sections 2 and 3 sought to remedy this evil and to bring about equality of treatment not only as to shippers but also as to carriers. *Chicago Junction Case,* 264 U. S. 258,

267. The Transportation Act, which greatly enlarged the Commission's power to deal with other matters, did not narrow or restrict its jurisdiction over discrimination. *United States* v. *Pa. R. R.*, **266 U. S. 191, 199.**

Orders of the Commission prohibiting unlawful discrimination against both carriers and shippers in respect of switching have been sustained by this court in a number of cases. They clearly establish the authority of the Commission to make the order here under consideration. *Pennsylvania Co.* v. *U. S.*, 236 U. S. 351; *U. S.* v. *Pennsylvania R. R.*, 266 U. S. 191, *supra.* And this authority is not affected by the fact that three of appellants do not connect physically with the South Shore. *United States* v. *Ill. Cent. R. R.*, 263 U. S. 515, *supra.* While not connecting physically, they reach that line under switching arrangements now existing with the Lake Erie & Western and are "effective instruments of discrimination." *St. L. S. W.* v. *U. S.*, 245 U. S. 136, 144.

It is true that the South Shore operates merely an electric line, while appellants operate steam railroads. But electric lines and their shippers are as much entitled to protection under sections 2 and 3 as steam roads. *United States* v. *Village of Hubbard,* 266 U. S. 474.

There is no contention by appellants that the proceedings before the Commission were irregular. Full opportunity to be heard was granted. The Commission in the exercise of the administrative

discretion conferred upon it has carefully and deliberately considered all the facts and circumstances and has concluded and found that appellants are guilty of unjust discrimination and undue prejudice. Its findings under the act are well within statutory and constitutional limits, are amply supported by the evidence, and are therefore conclusive.

We respectfully submit that the decree of the District Court should be affirmed.

R. GRANVILLE CURRY,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 150

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLEE, THE CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY COMPANY.

ERNEST S. BALLARD,
RUSH C. BUTLER,
WILLIAM E. LAMB,
JAMES DALE THOM,
Solicitors for The Chicago, Lake Shore and South Bend Railway Company.

BLAKELY-WARREN PRINTING COMPANY, CHICAGO.

Subject Index.

TABLE OF STATUTES AND CASES CITED.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

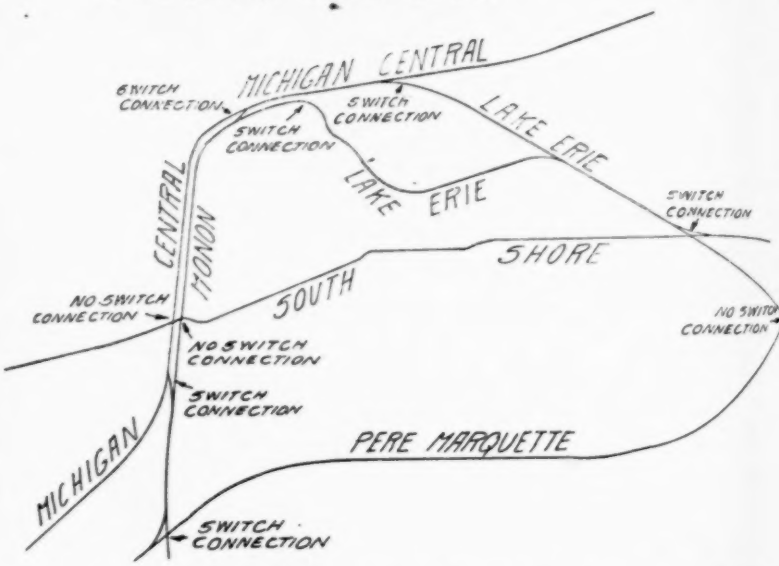
BRIEF FOR APPELLEE, THE CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY COMPANY.

STATEMENT OF THE CASE.

Appellee, the Chicago, Lake Shore and South Bend Railway Company (hereinafter referred to as the South Shore), one of the defendants below and the complainant before the Interstate Commerce Commission, operates a line of electric railroad between South Bend, Indiana, on the east and Kensington, Illinois, a point within the corporate limits of Chicago, on the west, and is engaged in the general transportation of passengers and property. The South Shore runs through Michigan City, Indiana, which is also reached by the lines of the Lake Erie & Western Railroad

Company (hereinafter referred to as the Lake Erie), the Michigan Central Railroad Company, the Chicago, Indianapolis and Louisville Railway Company (hereinafter referred to as the Monon) and the Pere Marquette Railway, appellants here and petitioners below.

In Michigan City the South Shore connects with the Lake Erie and the Lake Erie connects with the Michigan Central and the Monon. The Pere Marquette connects with the Monon. The position of the said five lines is shown in Exhibit D attached to the petition herein (R. 30) and Exhibit B, attached to the answer of the South Shore (R. 52). It is as follows:



In *C. L. S. & S. B. Ry. Co.* v. *Director General*, 58 I. C. C. 647, the Interstate Commerce Commission made an order requiring the Lake Erie to enter into reciprocal switching arrangements with the South Shore at Michigan City on the same terms and conditions as with the Monon and the Pere Marquette. The two last named

lines and the Michigan Central were not parties to that case and no order was made against them. The Lake Erie complied with the order by establishing reciprocal switching arrangements with the South Shore so far as industries served directly by it were concerned, but failed to make any provision for switching between the line of the South Shore and the lines of the other appellants at Michigan City, with which the South Shore has no direct connection. Moreover the other appellants declined to accept the traffic of the South Shore when tendered to them by the Lake Erie.

All of the appellants have opened their terminals at Michigan City to one another by establishing interchange and reciprocal switching arrangements among themselves, but have refused to establish such arrangements with the South Shore. For the purpose of securing from appellants, upon relatively reasonable terms, treatment similar to that which they accord to one another, the South Shore filed its complaint with the Interstate Commerce Commission. Upon this complaint a hearing was had and the presiding Examiner rendered a proposed report in which he recommended that the relief prayed for by the South Shore be granted. The appellants filed exceptions, supported by brief, to the Examiner's report and the case was orally argued before Division 3 of the Commission. Subsequently the Commission made its report and entered its order, granting the relief sought by the South Shore. *Chicago, Lake Shore and South Bend Railway Company* v. *L. E. & W. R. R. Co.*, 88 I. C. C. 525. A petition for re-argument was thereupon filed by the appellants and denied by the Commission.

The order made by the Commission was as follows (R. 30):

"This case being at issue upon complaint and an-

swers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before July 24, 1924, and thereafter to abstain, from the unjust discrimination and undue prejudice found in said report to result from their refusal to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and from their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant at Michigan City, Ind., upon relatively reasonable terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at that point.

It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before July 24, 1924, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid unjust discrimination and undue prejudice.

And it is further ordered, That this order shall continue in force until the further order of the commission."

As is customary in cases of discrimination this order is in the alternative and requires the appellants to cease and desist from the unlawful discrimination which the Commission found to exist, and to establish, maintain nad apply rates, regulations, and practices which will prevent and avoid that unlawful discrimination in the future.

The findings set forth in the Commission's report on which the order rests are in substance as follows: That the South Shore is engaged in the general transportation of freight (R., 27); that the terminals of appellants at Michigan City are open to one another but closed to the South Shore (R., 27); that the appellants have entered into arrangements for the interchange of traffic and reciprocal switching among themselves and hold themselves out to switch practically all traffic for one another regardless of the length of haul or point of origin, but refuse to enter into such arrangements with and switch traffic for the South Shore (R., 23-24); that there are three industries located on the line of the South Shore at Michigan City, two of which compete with industries on the lines of appellants at that point (R., 24); that the circumstances and conditions surrounding the interchange of traffic and reciprocal switching among appellants on the one hand and between the appellants and the South Shore on the other hand are substantially similar (R., 28); and that the refusal of appellants to switch interstate carload traffic moving over the line of the South Shore to or from Michigan City, while contemporaneously switching interstate carload traffic for each other at that point, and their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with the South Shore, upon relatively reasonable terms based upon a careful consideration of the similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in such arrangements with each other at that point, subjects the South Shore and its shippers to unjust discrimination and undue prejudice (R., 29).

The appellants brought this suit in the District Court of the United States for the District of Indiana and therein sought an interlocutory injunction restraining and suspending the order of the Commission until final hearing, and, upon final hearing, a decree annulling and enjoining the order. The case was heard before three judges on the plaintiff's motion for an interlocutory injunction. The District Court, without opinion, denied the injunction, and the case is before this court on direct appeal under the Act of June 18, 1910, c. 309, 36 Stat. 539, and the Act of October 22, 1913, c. 32, 38 Stat. 220.

SUMMARY OF ARGUMENT.

There are only two questions presented by this appeal: First, whether the Commission's conclusions upon the basis of which it exercised its statutory power were erroneous as a matter of law; and, second, whether the Commission's exercise of its powers deprived appellants of any of their constitutional rights. We advance affirmative arguments of our own as well as reply to the contentions in appellants' brief on these questions.

I.

SECTIONS 3 AND 15 OF THE INTERSTATE COMMERCE ACT CONFER UPON THE COMMISSION THE POWERS INVOKED BY THE COMPLAINT AND EXERCISED BY THE COMMISSION IN MAKING ITS ORDER.

Interstate Commerce Act, 41 Stat. 479, Paragraph (1), Section 3.

Interstate Commerce Act, 41 Stat. 479, Paragraph (3), Section 3.

Interstate Commerce Act, 41 Stat. 484, Paragraph (1), Section 15.

II.

THE COMMISSION'S FINDING THAT THE APPELLANTS WERE GUILTY OF UNJUST DISCRIMINATION AGAINST THE SOUTH SHORE IS FULLY SUPPORTED BY THE UNDISPUTED FACTS FOUND BY THE COMMISSION AND THE ORDER REQUIRING THEM TO CEASE AND DESIST THEREFROM IS WITHIN THE COMMISSION'S STATUTORY POWER.

1. **THE UNDISPUTED FINDINGS OF FACT CONTAINED IN THE COMMISSION'S REPORT FULLY SUPPORT THE ULTIMATE FINDING OF UNJUST DISCRIMINATION.**

Louisiana & P. B. Ry. Co. v. *U. S.* 257 U. S. 114.

Louisville & Nashville R. R. Co. v. *U. S.* 238 U. S. 1.

Interstate Commerce Commission v. *I. C. R. R. Co.* 215 U. S. 452.

United States v. *I. C. R. R. Co.* 263 U. S. 515.

Seaboard Air Line Ry. Co. v. *U. S.* 254 U. S. 57.

Pennsylvania Co. v. *U. S.* 236 U. S. 351.

Louisville & Nashville R. R. Co. v. *U. S.* 238 U. S. 1.

2. THE DISCRIMINATION FOUND BY THE COMMISSION IS UNLAWFUL AND IS DIRECTLY ATTRIBUTABLE TO THE APPELLANTS.

(a) There is direct contact between the common carrier operations of appellants and those of the South Shore.

Missouri Pacific R. R. Co. v. *Reynolds-Davis,* 268 U. S. 366.

Shapiro v. *B. & M. R. R. Co.* 213 Mass. 70.

St. Louis S. W. Ry. Co. v. *Jackson,* 55 Tex. Civ. App. 407.

Western Atlantic Ry. Co. v. *Exposition Cotton Mills,* 81 Ga. 522.

United States v. *U. P. R. R. Co.* 213 Fed. 332.

Manufacturers Ry. Co. v. *St. L. I. M. & S. Ry. Co.* 28 I. C. C. 93.

National Spring & Wire Co. v. *Director General,* 60 I. C. C. 564.

New York, New Haven and Hartford R. R. Co. v. *I. C. C.* 200 U. S. 361.

St. Louis S. W. R. R. Co. v. *U. S.* 245 U. S. 136.

Central R. R. Company v. *U. S.* 257 U. S. 247.

(b) In the absence of direct contact between the common carrier operations of appellants and those of the South Shore, the Commission could make a valid order requiring equality of treatment.

United States v. *Pennsylvania R. R. Co.* 266 U. S. 191.

(c) The alleged lack of reciprocity in the extent of terminal facilities and other similar matters does not constitute a differentiating circumstance negativing discrimination.

Pennsylvania Co. v. *United States,* 236 U. S. 351.

United States v. *Illinois Central R. R. Co.* 263 U. S. 515.

(d) The discrimination practiced by appellants is a source of advantage to them and their shippers and of disadvantage to the South Shore and its shippers, and the Commission so found.

III.

THE ORDER OF THE COMMISSION DOES NOT DEPRIVE APPELLANTS OF ANY OF THEIR CONSTITUTIONAL RIGHTS.

United States v. *Pennsylvania R. R. Co.* 266 U. S. 191.

United States v. *Illinois Central R. R. Co.* 263 U. S. 515.

Chicago Junction Case, 264 U. S. 258.

United States v. *American Ry. Exp. Co.* 265 U. S. 425.

Edward Hines Trustees v. *U. S.* 263 U. S. 143.

Wisconsin, etc. R'd. Co. v. *Jacobson,* 179 U. S. 287.

IV.

APPELLANTS' ASSIGNMENTS OF ERROR AND ARGUMENT WITH RESPECT TO THE COMMISSION'S JURISDICTION OVER THE SOUTH SHORE AND THE SOUTH SHORE'S STATUS AS A COMMON CARRIER UNDER PARAGRAPH (3) OF SECTION 15 ARE IRRELEVANT AND UNSOUND.

Interstate Commerce Act, 41 Stat. 484, Paragraph (3), Section 15.

Chicago Junction Case, 264 U. S. 258.

Louisville & Nashville R. R. Co. v. *United States,* 238 U. S. 1.

Pennsylvania Co. v. *United States,* 236 U. S. 351.

Manufacturers Ry. Co. v. *St. L. I. M. & S. Ry. Co.* 28 I. C. C. 93.

C. L. S. & S. B. Ry. Co. v. *Director General,* 58 I. C. C. 647.

Indiana Passenger Fares of C. L. S. & S. B. Ry. Co. 69 I. C. C. 180.

Louisiana & P. B. Ry. Co. v. *U. S.* 257 U. S. 114.

ARGUMENT.

I.

SECTIONS 3 AND 15 OF THE INTERSTATE COMMERCE ACT CONFER UPON THE COMMISSION THE POWERS INVOKED BY THE COMPLAINT AND EXERCISED BY THE COMMISSION IN MAKING ITS ORDER.

Paragraph (1) of Section 3 of the Interstate Commerce Act, 41 Stat. 479, provides as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Paragraph (3) of the same Section provides as follows:

> "All carriers, engaged in the transportation of passengers or property, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

Paragraph (1) of Section 15 of the Interstate Commerce Act, 41 Stat. 484, provides in part as follows:

> "That whenever, after full hearing, upon a complaint made as provided in Section 13 of this act, * * * the Commission shall be of opinion that

> any individual or joint * * * regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this act, is or will be * * * unjustly, discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe * * * what individual or joint * * * regulation or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, * * * and shall conform to and observe the regulation or practice so prescribed."

The issue presented to the Commission by the complaint was whether the appellants' refusal to accord the same treatment to the South Shore under substantially similar circumstances as they accorded to each other was such discrimination and denial of reasonable, proper and equal facilities as is forbidden by paragraphs (1) and (3) of Section 3 of the Interstate Commerce Act. The relief sought by the South Shore was the removal of that discrimination pursuant to an order to be made by the Commission under paragraph (1) of Section 15 of the Interstate Commerce Act. (R., 22).

After the hearing, the adequacy of which has not been and plainly cannot be denied by appellants, the Commission found that appellants' acts subjected the South Shore and shippers on its line to unjust discrimination. Thereupon, under the terms of the statute, it was the Commission's duty as well as its power to order the discrimination removed. This it did by the following order requiring the appellants to establish, maintain and apply rates, regulations, and practices which will prevent and avoid the unjust discrimination against the South Shore in the future (R., 30):

> "*It is ordered,* That the above named defendants

be, and they are hereby, notified and required to cease and desist, on or before July 24, 1924, and thereafter to abstain, from the unjust discrimination and undue prejudice found in said report to result from their refusal to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and from their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant at Michigan City, Ind., upon relatively reasonable terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at that point.

It is further ordered, That said defendants be, and they are hereby notified and required to establish, on or before July 24, 1924, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid unjust discrimination and undue prejudice."

In the succeeding divisions of our brief we shall show that this order was a lawful exercise by the Commission of its statutory powers.

II.

THE COMMISSION'S FINDING THAT THE APPELLANTS WERE GUILTY OF UNJUST DISCRIMINATION AGAINST THE SOUTH SHORE IS FULLY SUPPORTED BY THE UNDISPUTED FACTS FOUND BY THE COMMISSION AND THE ORDER REQUIRING THEM TO CEASE AND DESIST THEREFROM IS WITHIN THE COMMISSION'S STATUTORY POWER.

1. THE UNDISPUTED FINDINGS OF FACT CONTAINED IN THE COMMISSION'S REPORT FULLY SUPPORT THE ULTIMATE FINDING OF UNJUST DISCRIMINATION.

The fourth, fifth and sixth assignments of error (R., 64) are to the effect that the Commission's findings of

fact do not support the finding of unjust discrimination and the order requiring its removal. We deny that these findings are inadequate as alleged and assert that they fully support the Commission's ultimate finding. They are in effect as follows:

At Michigan City the South Shore connects with the Lake Erie, the Lake Erie with the Monon and the Michigan Central, and the Monon with the Lake Erie, the Michigan Central and the Pere Marquette. The Lake Erie and the Michigan Central do not connect with the Pere Marquette; and the Michigan Central, the Pere Marquette and the Monon do not connect with the South Shore. The Monon acts as an intermediate line between the Pere Marquette on the one hand and the Lake Erie and the Michigan Central on the other. (R., 22)

The switching charges and practices of the various roads at Michigan City are as follows: The Michigan Central switches for the Monon, the Lake Erie and the Pere Marquette, and absorbs the switching charges of those roads on traffic switched by them for it. The Monon switches for the Lake Erie, the Michigan Central and the Pere Marquette, and absorbs the switching charges of those roads on traffic switched by them for it. The Pere Marquette switches for the Monon, the Lake Erie and the Michigan Central, and absorbs the switching charges of those roads on traffic switched by them for it. The Lake Erie switches for the Michigan Central, the Monon, the Pere Marquette and the South Shore, and absorbs the switching charges of those roads on traffic switched by them for it. The South Shore switches for the Lake Erie and absorbs the switching charges of the Lake Erie on traffic switched by it for the South Shore. The Michigan Central, Pere Marquette and Monon tariffs make no provision for recip-

rocal switching with the South Shore and those roads do not switch traffic to industries on the South Shore or from the South Shore to industries on their rails. (R., 23-24.)

There are three industries located on the South Shore line at Michigan City and about sixty on the lines of the other roads. Two of the South Shore industries compete with industries on the lines of the other roads. Officials of the South Shore industries testified that reciprocal switching arrangements between the South Shore and the other lines would be to their advantage, as they are now required to receive freight arriving via such lines at their team tracks or pay an additional switching charge. Six shippers located on the Monon, Michigan Central and Pere Marquette testified that they have used the South Shore for less-than-carload traffic and have received very efficient and expeditious service, in many instances superior to that of the steam roads. If reciprocal switching arrangements were in effect and the South Shore's carload service were as good as its less-than-carload service, they would divert a portion of their carload traffic from the steam lines to the South Shore. (R., 24-25)

The terminals of the appellants are open except to the South Shore. (R., 27)

The fact that the Lake Erie will be required, under reciprocal switching, to act as an intermediate carrier of traffic to and from the South Shore is an accident of location and not a transportation difference. In length of haul or use of intermediate line the situation of the South Shore with respect to the Michigan Central or the Monon clearly is not dissimilar from that of the Pere Marquette with respect to the Michigan Central or the Lake Erie. Nor is the fact controlling that three inter-

changes and a somewhat longer intermediate haul may be required on traffic to and from the Pere Marquette. Each defendant holds itself out to switch practically all traffic of each other defendant, regardless of the length of the switching haul or point of origin or destination of shipment. (R., 28)

There is no dispute as to the correctness of these findings or the adequacy of the evidence on which they rest. Indeed there could be none on this record as the evidence on which the Commission acted is not before the Court. *Louisiana & P. B. Ry. Co.* v. *U. S.* 257 U. S. 114, 116. The ultimate finding of unjust discrimination is as follows (R., 29):

> "We find that the refusal of defendants to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and the failure and refusal of the defendants to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant upon relatively reasonable terms, based upon a careful consideration of the similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in such arrangements with each other at that point, subjects complainant and its shippers to unjust discrimination and undue prejudice which will be ordered removed."

The findings summarized above fully support this ultimate finding. The dissimilarity of treatment, the similarity of circumstances and conditions, the competition for traffic between the South Shore and appellants, the competition for business between the shippers on the South Shore and those on appellants' lines, and the injury to the South Shore and its shippers resulting from the denial of equal facilities, all clearly appear and

are beyond dispute. Upon such a showing being made the Commission had the power and it was its duty to make the order here under attack. The order having been so made the courts will not substitute their judgment for that of the Commission as to the effect of the facts found.

In *Louisville & Nashville R. R. Co.* v. *U. S.* 238 U. S. 1, the same contention was advanced as that here made by appellants (p. 14):

> "* * * the case was submitted to the District Court not to pass on the facts but on the theory that though the conflicting evidence might sustain the finding, the *facts found* did not as matter of law sustain the order." (Italics the Court's.)

After reviewing at length the very elaborate and voluminous evidence which the report showed to have been before the Commission, the Court rejected the contention in the following language (p. 16):

> "The report in this case shows that the rate-making body had before it much and varied evidence of this character. After considering it as a whole, the Commission found that the $1-rate on coal shipped from the Kentucky mines to Nashville was unreasonable. *In the light of these findings we cannot say that the facts set out in the Report, do not support the order.* And since there is no contention, at this time, that the reduced rate is confiscatory, we can but repeat what was said in *Int. Com. Comm.* v. *Louis. & Nash. R. R.* 227 U. S. 88:
>
> > 'The pleadings charged that the new rates were unjust in themselves and by comparison with others. This was denied by the carrier. The Commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. The value of such evidence necessarily varies according to the circumstances, *but the weight to be given it is peculiarly for the body experienced in such*

> *matters and familiar with the complexities, intricacies and history of rate-making in each section of the country.'* " (Italics ours.)

Thus, with respect to the effect of the *findings of fact* by the Commission, the Court applied the familiar rule with respect to the effect of the *evidence* before the Commission. The weight to be given to such findings, in the language of this Court, "is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate making in each section of the country."

To the same effect is *Interstate Commerce Commission* v. *I. C. R. R. Co.* 215 U. S. 452. That case involved the validity of a finding that it was unjustly discriminatory for a carrier to furnish cars to a mine for loading its own fuel coal without counting them as a part of the mine's distributive share of all cars. In the course of the opinion this Court said (p. 477):

> "Conceding, for the sake of the argument, the existence of the preferences and discriminations charged, it is insisted, *when the findings made by the commission are taken into view* and the pleadings as an entirety are considered, it results that the discriminations and preferences arose from the fact that the railroad company chose to purchase its coal for its fuel supply from a particular mine or mines, and that, as it had a right to do so, *it is impossible, without destroying freedom of contract, to predicate illegal preferences or wrongful discriminations from the fact of purchase.*" (Italics ours.)

After full discussion of the effect of the order the Court rejected this contention, saying (p. 478):

> "Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the commission the power which has been lodged in that body *to consider complaints as to violations of the statute and to correct them if found to exist,* or attack as crude or in-

> expedient the action of the commission *in performance of the administrative functions vested in it,* and upon such assumption invoke the exercise of *unwarranted judicial power* to correct the assumed evils." (Italics ours.)

This decision makes it clear that the question of the effect of findings is one of fact and that with respect to that question the Court will not substitute its judgment for that of the Commission.

United States v. *I. C. R. R. Co.* 263 U. S. 515, involved the same question, as appears from the following language of the opinion (p. 521):

> "There is no claim that any one of the evidential facts found by the Commission and relied upon to show that the discrimination was unjust, is without adequate supporting evidence. *The argument is that these facts, even when supplemented by others appearing in the evidence, do not warrant the finding of the ultimate fact,* that the higher rates from Knoxo are unduly prejudicial to the Swift Lumber Company to the extent that they exceed the blanket basis of rates from Fernwood (the junction of the Illinois Central) and other points." (Italics ours.)

The Court disposed of this question as follows (p. 524):

> "Every factor urged by the carriers as justifying the higher rate from Knoxo appears to have been considered by the Commission. *How much weight shall be given to each must necessarily be left to it.*" (Italics ours.)

Additional authorities could readily be cited but we regard the foregoing as adequate for present purposes. They show conclusively that the judgment of the Commission as to the weight and effect of the facts found by it is conclusive.

As illustrating the application of this doctrine to cases involving orders requiring equal treatment of connections in the matter of switching, reference may be made

to *Seaboard Air Line Ry. Co.* v. *U. S.* 254 U. S. 57. The Court there upheld an order requiring carriers to remove the discrimination found to result from the absorption of switching on competitive traffic and the refusal to absorb it on noncompetitive traffic. The Court said (p. 62):

> "The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimnaton against shippers for substantially like services. *Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority.*" (Citing cases.) (Italics ours.)

See also *Pennsylvania Co.* v. *U. S.* 236 U. S. 351, and *Louisville & Nashville R. R. Co.* v. *U. S.* 238 U. S. 1.

2. THE DISCRIMINATION FOUND BY THE COMMISSION IS UNLAWFUL AND IS DIRECTLY ATTRIBUTABLE TO THE APPELLANTS.

(a) There is direct contact between the common carrier operations of appellants and those of the South Shore.

The fourth, fifth and sixth assignments of error rest on the proposition that the lack of a direct physical connection between the *rails* of the Pere Marquette, the Monon or the Michigan Central on the one hand and the South Shore on the other precludes, as a matter of law, a finding of unjust discrimination on the part of the former as against the latter. We deny this proposition and assert that the discrimination found is unlawful and is attributable to the appellants.

The physical situation which gives rise to this contention by appellants is depicted in the diagram on page 2, *supra,* and is described in the report of the Commission as follows (R., 22):

> "At Michigan City the South Shore has a connection and interchange facilities with the Lake Erie & Western. The Lake Erie & Western also connects directly with the Monon and the Michigan Central. The Monon connects with the Pere Marquette, Lake Erie & Western, and Michigan Central, and acts as an intermediate line for the interchange of freight between points on the Pere Marquette on the one hand and points on the Lake Erie & Western and the Michigan Central on the other. The Lake Erie & Western and Michigan Central do not connect with the Pere Marquette, and the Michigan Central, Pere Marquette, and Monon do not connect with the South Shore."

Whether such a situation would furnish any basis for an order requiring the Pere Marquette, Michigan Central and Monon to enter into arrangements with the South Shore for reciprocal switching and absorption of switching charges *as an original matter and in the absence of such arrangements among themselves and with the Lake Erie* need not be considered. The whole basis for the order is the maintenance of such arrangements among themselves and the denial of equality of treatment in refusing to extend them to the South Shore upon similar terms, and the only thing required by the order is the granting of such equality. The reciprocal switching and absorption arrangements among appellants are described in the Commission's opinion herein (R., 23-34). They have the effect of bringing each of the appellants, as a matter of law, into physical contact with the South Shore. This is so because each of the appellants absorbs the switching charges applicable to movements between its rails

and points on the Lake Erie's terminals, and the Lake Erie's terminals are physically connected with the South Shore. Indeed the appellants will absorb such charges on cars destined to or from the plants of the Perfection Cooler Company and the Steel Fabricating Company on the Lake Erie, to reach which they must pass over the very switch points of the connection between the Lake Erie and the South Shore. (See map, R., 30.)

On inbound cars to Lake Erie deliveries the road-haul carrier, which absorbs the Lake Erie's switching charges, becomes the delivering line, and assumes, as between it and the Lake Erie, responsibility for the giving of notice of arrival, the collection of freight, the settlement of claims, and other matters arising between carrier and consignee. Similarly, on outbound cars from Lake Erie industries, the road-haul carrier, which absorbs the Lake Erie's switching charges, becomes the initial line, and assumes, as between it and the Lake Erie, responsibility for executing the bill of lading, and other matters arising between carrier and shipper. In other words the Lake Erie and any other necessary switching lines are, under the tariffs, the common carrier agents of the line-haul carrier to commence or complete transportation which the latter has undertaken but is not in a position to perform completely itself.

It matters not that this extension of service to the South Shore switch is accomplished by employment of an independent carrier. The controlling fact is that the service is, under the tariffs, that of the line-haul carrier, and referable to him. He could perform it in any one of a number of ways: by leasing and operating a track; by acquiring trackage rights and operating over such tracks; or (as here) by delivery to another carrier whom

he finds ready equipped to do the work at such other carrier's lawful tariff rates.

The same result is brought about in another way. The Lake Erie switches for the South Shore and the latter absorbs its charges. (R., 24) It results from this, for the reasons elaborated above, that the South Shore, *through its agent, the Lake Erie,* is in direct physical contact with the Michigan Central and the Monon; and the Pere Marquette, through its agent the Monon, is in contact with the South Shore's agent, the Lake Erie.

These propositions find full support in the decisions of the courts, in the decisions of the Commission and in the administration of the Statute by the Commission. The most recent pronouncement on the subject is the decision of this Court in *Missouri Pacific R. R. Co.* v. *Reynolds-Davis,* 268 U. S. 366. The Missouri Pacific was sued for loss of part of a carload of sugar which had been shipped on a through bill of lading from Raceland, La., to Fort Smith, Ark. The loss occurred in Fort Smith while the car was in possession of the St. Louis-San Francisco Railroad, which had been employed by the Missouri Pacific to switch the car to the consignee's plant, which was on the switching carrier's line. In holding the Missouri Pacific liable the Court said (p. 368):

> "The joint through rate covered delivery at the warehouse of the consignee. The bill of lading named Morgan's Louisiana & Texas Railroad and Steamship Company as initial carrier and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith but do not extend to the consignee's warehouse. *It employed the Saint Louis-San Francisco to perform the necessary switching service. And it paid therefor* $6.30, *the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the*

bill of lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery." (Italics ours.)

The cases in the state courts are to the same effect. In *Shapiro* v. *B. & M. R. R. Co.* 213 Mass. 70, plaintiff sued for partial loss of a car of oats, shipped from Kentland, Ind., and delivered to the defendant at Mechanicsville, N. Y., whence it was hauled by that carrier to Worcester, Mass., the destination. At Worcester the defendant delivered the car to the Boston & Albany Railroad and the latter switched it to its freight yard where the plaintiff unloaded it and discovered the loss. In holding the defendant liable the Court said:

> "If these facts were found by the jury, the defendant did not deliver the oats to the Boston & Albany Railroad, to be delivered by it as the last carrier to the consignee, *but did itself, as the last carrier, deliver them to the consignee, employing the Boston & Albany as its agent to haul the car to the Boston & Albany freight yard, and hiring the use of that yard as its yard for the delivery of these oats.*" (Italics ours.)

The doctrine was likewise applied in *St. Louis S. W. Ry. Co.* v. *Jackson,* 55 Tex. Civ. App. 407, and *Western Atlantic Ry. Co.* v. *Exposition Cotton Mills,* 81 Ga. 522. See also *United States* v. *U. P. R. R. Co.* 213 Fed. 332.

The Commission has expressed the same view. In *Manufacturers Ry. Co.* v. *St. L. I. M. & S. Ry. Co.* 28 I. C. C. 93, a case involving the question of equality of treatment of terminal lines in the matter of switching absorption, it said (p. 101):

> "There is evidently much confusion in the minds of complainants as to the true character of these allowances and the services for which rendered. Sometimes, for competitive or other reasons, a trunk line will absorb the charge of a connecting terminal line for gathering freight originating on

the latter to the rails of the trunk line. *Manifestly such service of the terminal line is one performed for the trunk line and not for the shipper,* and should be paid for by the trunk line and not by the shipper. * * * We are speaking now of a terminal line which is in all respects a carrier subject to the act." (Italics ours.)

Moreover, in its administration of the Act the Commission has made orders in other cases on identical states of fact similar to that here in question. That is to say it has required carriers to accord to connections with which they had no direct contact switching arrangements similar to those accorded direct connections.

In *National Spring & Wire Co.* v. *Director General,* 60 I. C. C. 564, the Commission found that the refusal of the five steam railroads serving Grand Rapids, Michigan, to absorb the switching charges of the Michigan Railroad, an electric line also serving that point, constituted unjust discrimination, and made an order requiring them to desist therefrom. The electric line connected directly with only one of the steam lines, while all of the steam lines connected directly with one another, so that switching between four of the steam lines and the electric line involved an intermediate switching movement, while that was not true as among the steam lines themselves. The Commission nevertheless found, just as they did here, that the circumstances and conditions were substantially similar. The practical construction by an administration branch of the Government of a statute with the enforcement of which it is charged is entitled to special weight. Indeed this Court has held that such construction is binding, at least until Congress has altered it by legislation. *New York, New Haven and Hartford R. R. Co.* v. *I. C. C.* 200 U. S. 361. The Court there said (p. 401):

"* * * *we concede that the interpretation given*

by the Commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute." (Italics ours.)

Upon the foregoing authorities we respectfully insist that all of the appellants are in direct contact with the South Shore and accordingly owe it the duty of equal treatment under the Statute. The fallacy in appellants' contention on this point lies in the fact that they make it turn on the lack of a direct connection of the "rails," meaning the steel itself. That is wholly foreign to the problem. If the point has any validity at all it must rest on the presence or absence of contact between the *common carrier operations* of appellants and the South Shore. As we have shown such contact exists, not only by virtue of appellants' absorption of the Lake Erie switching charges but also by virtue of the South Shore's absorption of the Lake Erie's switching charges. Plainly the discrimination found by the Commission is unlawful and is directly attributable to appellants.

The cases cited and relied on by appellants in support of the contrary view do not sustain it. *St. Louis S. W. R. R. Co.* v. *U. S.* 245 U. S. 136, is directly contra, as is clear from the passage quoted in appellants' own brief (p. 33). The Court said (p. 144):

"Carriers insist also that the order is void on the ground that, since their 'rails do not reach Padu-

cah, they cannot be guilty of discrimination against that city.' *They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination.''* (Italics ours.)

Similarly here appellants' rails do not reach the South Shore but they bill traffic from and to points on the Lake Erie, including points beyond the Lake Erie's connection with the South Shore, absorbing the charges of the Lake Erie for originating or delivering it, "and thereby they become effective instruments of discrimination."

That case necessarily overruled *St. Louis, Iron Mountain & Southern Ry. Co.* v. *U. S.* 217 Fed. 80, as the order of the Commission which was set aside by the District Court in the latter case was identical with that which was upheld by this Court in the former. This is clear from the Commission's statement in *Metropolis Commercial Club* v. *I. C. R. R. Co.,* 30 I. C. C. 40, 41, wherein the order was made which was set aside by the District Court in the *St. Louis Iron Mountain & Southern case,* to the effect that it involved the same rate structure, was based on the same facts and raised the same issues as *Paducah Bd. of Trade* v. *I. C. R. R. Co.* 29 I. C. C. 583, which, with the later decision in *Paducah Bd. of Trade* v. *I. C. R. R. Co.* 37 I. C. C. 719, was the basis for the order which was upheld by this Court in the *St. Louis Southwestern case.*

Central R. R. Company v. *U. S.* 257 U. S. 247, involved a wholly dissimilar state of facts from that presented in the case at bar. There the Commission had found that the refusal of the appellant carriers to grant a transit privilege at Newark, New Jersey, while participating in joint rates from the South in connection with which their southern connections granted a transit privilege, constituted unlawful discrimination and ordered them to cease

and desist therefrom. After pointing out that a finding that discrimination is unjust is ordinarily a finding of fact this Court said (p. 256):

> "But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, and whether they can be required to cancel existing joint rates, unless it is removed. No finding made by the Commission can prevent the review of such questions. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *Philadelphia & Reading Ry. Co.* v. *United States*, 240 U. S. 334."

The ground of the decision was not that the appellants did not reach the southern points where transit was granted *but that they did not grant the transit at those points.* This is clear from the following language quoted and relied on by appellants (p. 259):

> "But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination *only if each carrier has participated in some way in that which causes the unjust discrimination,* as where a lower joint rate is given to one locality than to another similarly situated." (Italics ours.)

These principles have no application here. The appellants all participate in the unjust discrimination by refusing to grant reciprocal switching to the South Shore although they have granted it to one another. They are in a position either to grant it to the South Shore or withdraw it from one another and consequently they are properly held responsible for it.

(b) In the absence of direct contact between the common carrier operations of appellants and those of the South Shore, the Commission could make a valid order requiring equality of treatment.

Even if there were no direct contact between appellants' common carrier operations and those of the South Shore it would be within the Commission's administrative power, on a proper showing, to find unlawful discrimination and require its removal. The extension of service to some and the refusal to extend it to others similarly circumstanced, *although the latter are beyond physical range of the carrier's operations,* may constitute unjust discrimination and an order to cease and desist therefrom is valid. Just such an order was upheld in *United States* v. *P. R. R. Co.* 266 U. S. 191. The Commission had condemned as unjustly discriminatory the acts of the Pennsylvania and Western Maryland Railroad in granting one another trackage rights within a portion of the City of York, Pa., so that shippers on that part of the line of each could make use of the lines of both, while refusing to grant such rights in the remainder of the city. The contention advanced by appellants here was vigorously pressed in this Court and was stated thus in the Court's opinion (p. 197):

> "The argument most strongly urged is this: In the absence of an appropriate order carriers are not obliged to extend or curtail their facilities; or to submit to enlarged use of their terminals. The arrangement by which the Pennsylvania and the Western Maryland extend, each to the other, the use of their tracks to effect terminal receipt and delivery of carload freight within the zone is a trackage agreement and is, in law, either a limited extension of the line of each carrier or an agreement for the limited common use by each carrier of terminal facilities of the other. *To accord to plants without the zone the same service which, under the arrangement, is enjoyed by those within the zone would involve either a further*

extension of the tracks of each carrier or an enlargement of the common use of their terminal facilities. Under the Interstate Commerce Act, as amended by Transportation Act, c. 91, 41 Stat. 456, the Commission might, upon proper findings and conditions, have ordered such extension of tracks, under the powers conferred by Sec. 1, par. 21, p. 478; or it might have ordered an enlargement of the common use of terminals under Sec. 3, par. 4, p. 479; or it might have equalized rates and charges for plants within and without the zone by exercise of the power, conferred by sec. 15, pars. 3 and 4 pp. 485, 486, to establish through routes and joint rates. The grant of these specific powers indicates a purpose on the part of Congress to so restrict the Commission's general power to prevent unjust discrimination, prohibited by Sec. 3, *that a preference granted certain shippers served by a carrier by virtue of the ownership of tracks or trackage rights over other shippers not reached by the carrier, because it does not own tracks or trackage rights which would enable it to reach them, cannot warrant a finding of undue discrimination;* and that similarly the withholding or possession of trackage rights between carriers cannot, in law, constitute undue preference." (Italics ours.)

However this contention did not prevail. The Court rejected it in the following language (p. 199):

"The argument is, in our opinion, unsound. There is nothing in the Act to Regulate Commerce, as originally enacted, or in Transportation Act, 1920, or in any earlier amendment, which indicates a purpose on the part of Congress either to allow a carrier to create undue prejudice by the use of facilities possessed, or to narrow the Commission's powers to prevent unjust discrimination. * * *

"The Commission has found, not merely that the facilities in question were granted to some and refused to others, *but that the grant and refusal have, by reason of the use made and intended to be made of the facilities, resulted in undue prejudice.* It is true that an extension of trackage rights, an enlarged common use of terminals, or the establishment of through routes and joint rates, or the with-

drawal of any of them, could not be ordered except upon the findings and conditions prescribed in the act. But the order complained of does not require any such thing. It requires only that the carriers shall desist from a practice which involves such use as has resulted and will result in the undue prejudice found. The order leaves them free to remove the discrimination by any appropriate action." (Italics ours.)

The Pennsylvania had extended its line to certain Western Maryland shippers by securing trackage over the Western Maryland. It had refused to extend its line in a similar manner to other Western Maryland shippers. In like manner the Western Maryland had extended its line to certain Pennsylvania shippers by securing trackage over the Pennsylvania but had refused to extend it to others in a similar manner. *Each company was held guilty of unjust discrimination as between shippers which it did reach and serve and shippers which it did not reach or serve.* Clearly direct contact between the carrier complained of under Section 3 and the party complaining is wholly unnecessary to establish a violation of that section.

(c) The alleged lack of reciprocity in the extent of terminal facilities and other similar matters does not constitute a differentiating circumstance negativing discrimination.

Appellants faintly urge that the alleged lack of reciprocity between themselves and the South Shore in the extent of terminal facilities, number of freight cars, number of industries served, extent of reciprocal services elsewhere, and amount of business originated and delivered, constitutes such a dissimilarity of circumstances as to negative unjust discrimination and render the order unlawful. This contention is based on the view that, inasmuch as appellants control a greater volume of traffic

than the South Shore, they are justified in entering into reciprocal switching arrangements with one another while declining to do so with it. The question has been directly passed on by this Court and the contention rejected without qualification. *Pennsylvania Co.* v. *United States*, 236 U. S. 351. The Court said (p. 364):

> "*That there is no discrimination in fact is rested upon the argument that with the other three roads the Pennsylvania Railroad has certain reciprocal arrangements in the Mahoning and Shenango Valleys, by which these three roads interchange cars with the Pennsylvania Railroad. It is contended that this, more than the $2.00 per car, is the real inducement for the treatment of those railroads.* But, as the Commission found, the amount of traffic exchanged between these three railroads is of a varying and differing quantity, and to ascertain the value of such service to the Pennsylvania Railroad would be a futile undertaking, involving uncertain and speculative considerations as to the value of this and that service and the varying cost of performing such service at remote and different places. The statements in the record, presented to the Commission by the Pennsylvania Company, show the great difference in service of this character rendered by the three railroads and by the Pennsylvania Company for the different roads. For instance, it is shown that during 1911 the Baltimore & Ohio switched for the Pennsylvania 69 cars at New Castle, and in the Valleys generally 4,185 cars, while the Pennsylvania Company switched for the Baltimore & Ohio 8,286 cars in New Castle, and in the Valleys generally 8,900 cars. The Rochester Company switched for the Pennsylvania in the same year 406 cars in New Castle and 3,661 cars to points adjacent thereto. The Rochester Company moved for the Pennsylvania Company in New Castle 337 cars more than did the Baltimore & Ohio, and in gross totals, through and into adjacent regions, 187 cars less. The Pennsylvania Company moved nearly twice as many cars for the Baltimore & Ohio road as the Baltimore & Ohio did for it. The Government therefore contends with much force that such reciprocal switching ar-

rangements ought not to justify giving cars shipped over the Baltimore & Ohio Railroad a preference denied the cars shipped over the lines of the Rochester road, which cars enter New Castle on the same track and reach the same junction points. And as we have said the question of compensation is not here involved, and what compensation the Pennsylvania Company might require from the Rochester Company is not now to be determined. *We agree with the Commission and the court below that the alleged reciprocal shipping arrangements do not remove the discriminatory character of the treatment of the Rochester road.*" (Italics ours)

In the recent case of *United States* v. *Illinois Central R. R. Co.* 263 U. S. 515, the same question was presented to this Court in a somewhat different form. It appeared in that case that the Illinois Central blanketed large territories along its line south of Jackson, Mississippi, to the Gulf of Mexico and from the Mississippi River into Alabama, and applied one rate on all shipments of lumber moving to and north of the Ohio River, with the single exception of a station called Knoxo on the line of the Fernwood & Gulf R. R. Co. From this point the Illinois Central charged its own line-haul rate plus the local rate of the Fernwood & Gulf from the point of origin to its junction with the Illinois Central. The Illinois Central attempted to justify its discriminatory treatment of Knoxo on the ground that the traffic coming from the Fernwood & Gulf was noncompetitive while that from other points where the rate was blanketed was competitive, and that its refusal to blanket the rate from Knoxo was in the interest of the preservation of its own revenue and was justified by controlling differences in circumstances. With respect to this contention the Court said (p. 523):

"The effort of a carrier to obtain more business, and to retain that which it has secured, proceeds from a motive of self-interest which is recognized

> as legitimate, and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice, though the carrier's motives in granting them are honest. *Interstate Commerce Commission* v. *C. G. W. Ry. Co.*, 209 U. S. 108, 122. Self-interest of the carrier may not override the requirement of equality in rates."

It is thus clear that the theory of reciprocity, or self-interest, cannot prevail. Such considerations do not justify discrimination in rates or services.

(d) The discrimination practiced by appellants is a source of advantage to them and their shippers and of disadvantage to the South Shore and its shippers, and the Commission so found.

Appellants also suggest that the discrimination practiced by them is not undue under the rule that the prejudice to one party is not a source of advantage to the other. Without conceding this rule to be of universal application we desire to point out that the Commission's finding refutes appellants' suggestion and renders the rule inapplicable. The South Shore industries compete with those on the lines of appellants (R., 24); it would be to their advantage if the South Shore had reciprocal switching arrangements with appellants (R., 24-25); under present arrangements they are required to receive traffic transported to Michigan City by appellants on the latters' team tracks and in some instances they have been required to pay additional switching charges (R., 25); if reciprocal switching arrangements were in effect and if the South Shore's carload service were as good as its less-than-carload, shippers on appellants' lines would divert business to the South Shore (R., 25). Obviously the handicap under which the South Shore now labors in competing with appellants for the traffic of Michigan City shippers is a source of advantage to appellants, as

it permits them to retain traffic which they would otherwise lose to the South Shore on account of its superior service. Similarly the handicap under which South Shore shippers now labor in having to haul or pay extra switching on freight arriving via appellants' lines is a source of advantage to appellants' shippers as the latter receive their freight without such extra charges and sell the same in competition with the South Shore shippers. Obviously also the withdrawal of reciprocal switching among appellants would do away with these advantages and disadvantages as all shippers would then have to haul their freight to and from the freight houses of roads on which they are not located and all roads would have to compete on an equality for the business of shippers not located on their own lines.

III.

THE ORDER OF THE COMMISSION DOES NOT DEPRIVE APPELLANTS OF ANY OF THEIR CONSTITUTIONAL RIGHTS.

Appellants assert in their third assignment of error that the order deprives them of their property without due process of law in violation of the Constitution. In support of this appellants state, in effect, that they cannot comply with the order except by interchanging freight with the South Shore under similar conditions as they interchange with each other and that, consequently, some of the traffic they would otherwise secure will go to the South Shore. This contention is unsound because it rests upon an assumption which is contrary to fact. Appellants are not required by this order or by other order or circumstance to continue the maintenance of these arrangements among themselves and to extend them to the South Shore. In the language of this Court in *United States* v. *Pennsylvania R. R. Co.*, 266 U. S. 191, 199, "the

order complained of does not require any such thing. It requires only that the carriers shall desist from a practice which involves such use as has resulted and will result in the undue prejudice found. The order leaves them free to remove the discrimination by any appropriate method."

The only circumstance which appellants rely upon in their brief as establishing their alleged inability to comply with the order by ceasing to interchange traffic among themselves is that to do so would be contrary to public interest and necessity. The Commission did not so find and there is nothing in the record here in support of appellants' assertion. Therefore there is no legal requirement that appellants continue to interchange among themselves in the manner described in the Commission's report and obviously appellants' mere opinion that a cessation of such interchange practices among themselves would be contrary to public interest or necessity does not demonstrate their inability or lack of right to discontinue such practices.

But even if, in compliance with the order, appellants accord the same treatment to the South Shore as they now do to themselves and consequently divide their traffic with the South Shore they are not thereby deprived of any constitutional right. Appellants' position, in substance, is that they, four competing carriers, may voluntarily maintain reciprocal switching arrangements among themselves, thus putting themselves in a position where each of them may deprive another of the competitive traffic which it might otherwise have retained, thereby dividing the traffic among themselves, but that they cannot be required, under Section 3 of the Interstate Commerce Act, to admit a fifth competing carrier (The South Shore) to such arrangements on a similar basis, because

they have a constitutional right to all of that traffic and to freedom from the competition of the fifth carrier for some of it upon the same conditions as they compete for it among themselves, even though their conduct unduly prejudices that fifth carrier and denies it that equality of treatment which it is the fundamental purpose of the Interstate Commerce Act to secure to all in like circumstances. This position is unsound.

> "The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. *Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108, 122. Self-interest of the carrier may not override the requirement of equality in rates." (*United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 523.)

That there is no constitutional right such as appellants claim is also shown by the following decisions of this Court: *Chicago Junction Case*, 264 U. S. 258, 267; *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 437-438; *Edward Hines Trustees* v. *U. S.* 263 U. S. 143, 148; *Wisconsin, etc. R'd Co.* v. *Jacobson*, 179 U. S. 287, 300.

As supporting their contention appellants cite *Louisville & Nashville R. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132. The facts of that case are wholly unlike those presented in the case at bar and the decision is not applicable here. That case was not concerned with the removal of any unlawful discrimination but the question before the court was whether the Louisville & Nashville could be required, under a Kentucky statute, *irrespective of any unlawful discrimination*, to receive at its connection with another carrier and to switch, transport and deliver freight consigned from a point on the other

carrier's line to a point on the line of the Louisville & Nashville. As this Court said in *Grand Trunk Ry.* v. *Michigan Ry. Comm.*, 231 U. S. 457 at page 472 and again in *Pennsylvania Co.* v. *United States*, 236 U. S. 351 at page 371:

> "the case turned upon the point that the roads were competitive and the point of delivery an arbitrary one and that thereby the terminal station of one company was required to be shared with the other."

But the case at bar is not one in which appellants have been required to give the use of their terminal facilities to the South Shore. In its report (R., 27) the Commission said:

> "Our powers under paragraph (4) of section 3 of the interstate commerce act to require the joint use of terminals are not here invoked."

Here the Commission found that appellants' practices, which they voluntarily instituted and maintained among themselves, denied to the South Shore that equality of treatment to which it was entitled under the Interstate Commerce Act. The order merely requires appellants to remove the unlawful discrimination in some appropriate manner. These circumstances completely differentiate the case at bar from the *Central Stock Yards case* and show that the principles of law applied there are inapplicable here.

The cases cited on page 48 of appellants' brief (*Chicago, Indianapolis & Louisville Ry. Co.* v. *Public Service Commission*, 188 Ind. 334 and *Indiana Harbor Belt R. R. Co.* v. *Public Service Commission*, 187 Ind. 660) are also inapplicable here. In the first case cited the court decided that an order of the Indiana Public Service Commission directing the construction of an interchange track connecting two lines of railroad for the transfer of freight between them was invalid because it was not supported

by any substantial evidence of public necessity for the connection. In the other case the court similarly held that an order of the Indiana Commission requiring two carriers to establish joint through rates between all points on their lines in Indiana was invalid because there was no evidence before the Commission that there was any public necessity for such rates. In each case the court stated that a showing of public necessity was the test of the legality of the order. These cases involved only questions of local law governing the statutory powers of the Indiana Commission over intrastate traffic. In neither case was any constitutional question decided *nor was any question of unlawful discrimination presented.* It may be noted, however, that in the first case cited the Indiana Supreme Court said (188 Ind. p. 339) that "such an order (for an interchange track) will not be denied because it may have the effect of affording facilities which will be of advantage to one of the companies interested in securing business which would otherwise be handled by another company."

In view of the facts surrounding this case and the authorities we think it is clear that the order complained of does not deprive appellants of any of their constitutional rights.

IV.

APPELLANTS' ASSIGNMENTS OF ERROR AND ARGUMENT WITH RESPECT TO THE COMMISSION'S JURISDICTION OVER THE SOUTH SHORE AND THE SOUTH SHORE'S STATUS AS A COMMON CARRIER UNDER PARAGRAPH (3) OF SECTION 15 ARE IRRELEVANT AND UNSOUND.

Appellants contend that the validity of the Commission's order depends upon whether the Commission has jurisdiction over the South Shore under the provisions of paragraph (3) of Section 15 of the Interstate Commerce Act and that in order to entitle it to the relief granted by the Commission the South Shore was bound to show that it was not excepted by the provisions of said paragraph (3) from the power thereby conferred upon the Commission. That contention and the assignments of error it relates to are wholly irrelevant because the question of the Commission's jurisdiction under paragraph (3) of Section 15 is not now and never has been in this case.

Paragraph (3) of Section 15 empowers the Commission to establish through routes, joint rates, and operating conditions applicable to through routes between carriers, except "between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character." The Commission's powers under this paragraph were not invoked and were not exercised. The South Shore did not ask for the establishment of through routes and joint rates and the order did not direct their establishment.

The right which the South Shore sought to enforce by this proceeding was its fundamental right to equality of treatment under the provisions of Section 3. See

Chicago Junction Case, 264 U. S. 258, 267. That right is wholly independent of the provisions of paragraph (3) of Section 15, and it is by virtue of its powers under Section 3 that the Commission made its order, which obviously does not establish through routes or joint rates or operating conditions for through routes. The order is solely a Section 3 order and its only requirement is that the unlawful discrimination against the South Shore be removed.

A contention similar to that made by appellants was made in *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1, the offending carriers contending that the Commission's order requiring them to switch all traffic for the Tennessee Central compelled the establishment of through routes and joint rates. This Court disposed of that contention in the following language which is applicable with equal force in this case (page 18):

> "These objections treat the order as being broader than its terms. The Commission did not * * * direct the Appellants to establish a joint rate and a through route with the Tennessee Central * * * but only required them to render to the latter the same service that each of the Appellants furnishes the other in switching cars to industries located in and near the Yard."

The difference between orders establishing joint rates and through routes and orders requiring the removal of unjust discrimination has also been recognized by this Court in *Pennsylvania Co.* v. *United States,* 236 U. S. 351, at page 358. See also *Manufacturers Ry. Co.* v. *St. L. I. M. & S. Ry. Co.* 28 I. C. C. 93, 103, for a discussion of the distinction between switching absorptions and through routes and joint rates.

Since the powers conferred upon the Commission by paragraph (3) of Section 15 were not invoked or exer-

cised in this case, it clearly was not necessary for the South Shore to make any showing as to the Commission's jurisdiction over it under the provisions of that paragraph. Appellants' assignments of error and argument proceeding from their false premise to the contrary are therefore irrelevant and there is no occasion to consider in this case the question they thus seek to raise.

Notwithstanding the immateriality of any question of the Commission's jurisdiction under paragraph (3) of Section 15, we wish to call to the Court's attention that it has been repeatedly determined by the Commission that the South Shore is a common carrier by railroad and is engaged in the general transportation of freight.(*) The Commission's report (R., 22, 27) shows that there was evidence before it in this case that the status of the South Shore had not changed since those earlier cases and that there was no evidence before the Commission to refute its earlier determinations. Those determinations were adhered to by the Commission in this case and they cannot be assailed here because the evidence before the Commission (and the report shows that there was evidence) is not before the Court. *Louisiana & P. B. Ry. Co.* v. *United States*, 257 U. S. 114, 116. The determination and the facts stated by the Commission in its report establish the fact that the South Shore "is engaged in the general business of transporting freight in addition to (its) passenger and express business." Moreover the general question of the Commission's jurisdiction over interurban electric lines is foreclosed by *United States* v. *Village of Hubbard*, 266 U. S. 474. Consequently, even if the order in this case had established through routes and joint rates, it would not

C. L. S. & S. B. Ry. Co. v. Director General, 58 I. C. C. 647; *Indiana Passenger Fares of C. L. S. & S. B. Ry. Co.* 69 I. C. C. 180.

be subject to attack upon the ground that the Commission did not have jurisdiction over the South Shore for that purpose. Appellants' assignments of error and arguments on this question therefore are not only irrelevant but unsound and contrary to the Commission's conclusions which are supported by substantial evidence.

CONCLUSION.

We have discussed all of the appellants' assignments of error except the first and second, and have shown that they are without validity. The first two assignments are general and require no separate consideration. They must fall with the others. The Commission's order is clearly within its statutory power and does not invade appellants' constitutional rights. The judgment of the District Court should be affirmed.

Respectfully submitted,

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(6)

SUPREME COURT OF THE UNITED STATES.

No. 150.—October Term, 1925.

Chicago, Indianapolis & Louisville Ry. Co. et al., Appellants, *vs.* United States of America et al.	Appeal from the District Court of the United States for the District of Indiana.

[March 1, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

Four steam railroads whose lines enter Michigan City, Indiana, brought this suit against the United States, in the federal district court for that State, to set aside an order of the Interstate Commerce Commission entered April 2, 1924. The order directed the steam railroads to remove the unjust discrimination which the Commission found was being practiced against an electric railroad, which also entered that city, by refusal to switch its interstate carload traffic and to make arrangements with it for reciprocal switching. *Chicago, Lake Shore & South Bend Ry. Co.* v. *Lake Erie & Western R. R. Co.*, 88 I. C. C. 525. The order was assailed on the grounds that the facts found did not in law sustain the finding of unjust discrimination; that the order deprives the plaintiffs of their property in violation of the due process clause; and that the electric railroad was not shown to be within the class of carriers entitled to relief against discrimination. The Commission and the electric railroad on whose behalf the order was entered intervened in the suit as defendants. The case was heard before three judges on application for a preliminary injunction which was denied without opinion. It is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

The essential facts are these. The Chicago, Lake Shore & South Bend Railway Company, sometimes called the South Shore, is an electric passenger railroad which is engaged also in the general transportation of freight. *Indiana Passenger Fares, etc.*, 69

I. C. C. 180. Its line extends from South Bend, Indiana, to Kensington, a station within the corporate limits of Chicago. At Michigan City it has physical connection with the Lake Erie and Western—a steam railroad which is a part of the New York Central system. The Lake Erie refused to establish through routes and joint rates to or from points on the South Shore and also refused to establish with it satisfactory interchange switching charges to industries at Michigan City. It had established such switching interchange with the three other steam railroads which enter that city—the Chicago, Indianapolis & Louisville, commonly called the Monon, the Michigan Central and the Pere Marquette. To remove the alleged discrimination, the South Shore brought against the Lake Erie alone the proceeding reported in *Chicago, Lake Shore & South Bend Ry. Co.* v. *Director General*, 58 I. C. C. 647. By the order there entered the Lake Erie was directed to establish such through routes and joint rates with the South Shore; and was also directed to cease and desist from discriminating by refusing to perform reciprocal switching service with it while performing such switching with the three steam railroads named. The Lake Erie elected to remove the discrimination by entering into such reciprocal switching arrangements with the South Shore.

None of the other three steam railroads had been a party to the proceeding against the Lake Erie. None of them had established through routes or joint rates with the South Shore to points on its line. Each of them refused to enter into an arrangement with it for reciprocal switching. But each of the four steam railroads had an arrangement for reciprocal switching with each of the others. Thus the South Shore still remained at a disadvantage in handling traffic at Michigan City. To remove the discrimination so arising a second petition was filed which resulted in the order here assailed. The position of the other steam railroads differed in one respect from the Lake Erie. It alone had a direct physical connection with the South Shore at Michigan City. Cars from the South Shore could not reach either the Michigan Central or the Monon without passing over tracks of the Lake Erie. They could not reach the Pere Marquette without passing over tracks of both the Lake Erie and the Monon.

The South Shore was within the switching district at Michigan City and through routes and arrangements were already in effect by which traffic from the Monon, the Michigan Central and the Pere Marquette would be delivered there to the South Shore as an industry; and on such traffic the switching charges would be absorbed. Compare *Missouri Pacific R. R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366. The refusal of the steam railroads complained of relates to interchange traffic with the South Shore as a carrier for shippers on its line. The Commission found that this refusal constituted a discrimination, because each steam railroad rendered a like service for each of the others. The steam railroads contend that the circumstances and conditions in respect to the steam railroads were not similar, and that, hence, there could not in law be unjust discrimination. But the absence of direct physical connection between the South Shore and the three steam railroads other than the Lake Erie is the basis of the main attack upon the validity of the order.

First. The steam railroads contend that, in effect, the order directs them to establish through routes and joint rates, or to allow a common use of terminals; that such extensions of service can legally be made only upon a finding that public necessity and convenience require them, Transportation Act, 1920, c. 91, amending Interstate Commerce Act, § 1, par. 21; § 3, par. 4; § 15, pars. 3 and 4, 41 Stat. 456, 478, 479, 485, 486; and that, without making such a finding, the Commission has, under the guise of a discrimination order, compelled them to extend their service. It is argued that, as a matter of law, a carrier cannot be guilty of unjust discrimination unless it is able by its own act to remove the inequality; that where there is no direct physical connection with the railroad alleged to be discriminated against, and no joint service is being rendered by the three steam railroads with the South Shore, there cannot, in law, be unjust discrimination, because the existing inequality can be removed only by the consent of a third party, the intermediate carrier.

The order does not require the steam railroads to extend any service to the South Shore. It leaves them free to remove the discrimination by any appropriate action. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *United States* v. *Illinois Central*

R. R. Co., 263 U. S. 516, 521. Direct physical connection with the carrier subjected to prejudice is not an essential. *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury. *United States* v. *Pennsylvania R. R. Co.*, 266 U. S. 191, 197-9. There is nothing to the contrary in *Central R. R. Co. of N. J.* v. *United States*, 257 U. S. 247. The relief sought there was denied solely because the Central, although it participated in establishing the through route and joint rate, did not participate in the service which alone was alleged to constitute discrimination. Here each of the steam railroads was an effective instrument of the discrimination complained of.

Second. It is contended that the circumstances and conditions under which the interchange switching service was performed by the steam railroads for each other were essentially dissimilar from those under which such service would be performed for the South Shore. As establishing dissimilarity, the steam railroads point to the South Shore's absence of direct physical connection with any of the carriers except the Lake Erie; to the South Shore's relatively limited terminal facilities at Michigan City; to its relatively small number of freight cars; to the relative fewness of industries on its line; to the fact that the steam railroads exchange traffic at many points, while the South Shore will exchange traffic with them only at Michigan City; to the fact that the South Shore will originate relatively little business which can pass to the lines of the steam railroads, while they originate much which may pass to the South Shore. Despite these facts, the Commission found that the circumstances and conditions were similar. The court cannot substitute its judgment for that of the Commission. *United States* v. *New River Co.*, 265 U. S. 533, 542. The alleged lack of reciprocity and the other facts stated do not constitute, as a matter of law, differentiating circumstances which negative discrimination. Compare *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 364; *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 523.

Third. It is contended that the order takes the steam railroads' property without due process of law. The argument is that, while in form the order leaves open to them alternatives, no one would seriously urge that they can, as a practical matter, comply with the Commission's order by ceasing to interchange traffic between themselves, as that would be contrary to obvious public interest and necessity; that, therefore, in effect, the order requires them to permit the South Shore to take a part of the business which they are handling adequately; that business now enjoyed by them is their property, and that the order, therefore, amounts to taking their property in violation of the Constitution. Substantially the same objection was made and overruled in *Pennsylvania Co.* v. *United States,* 236 U. S. 351, and *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1, 20. Compare *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57; *United States* v. *Illinois Central R. R. Co.,* 263 U. S. 515, 523; *United States* v. *American Ry. Express Co.,* 265 U. S. 425, 437-8.

Fourth. It is contended that the effect of the Commission's order is to require the steam railroads to establish the practice of reciprocal switching with the South Shore, and to establish rates and charges covering such switching; that power to issue such an order exists only where the carrier is "engaged in the general business of transporting freight in addition to" its passenger business, as required by § 418 of Transportation Act, 1920, February 28, 1920, c. 91, §§ 418, 421, 41 Stat. 456, 484, 487-8; and that the Commission was without jurisdiction to enter the order because there is not in the record satisfactory evidence that the South Shore was engaged in the general transportation of freight. See *The Chicago Junction Case,* 264 U. S. 258. Since the decision of this case below, it has been held by this Court that the Commission has power to prevent unjust discrimination practiced by an electric railroad against a steam railroad engaged in interstate commerce, even if the electric line is neither operated as part of a steam railway system nor engaged in the general transportation of freight in addition to its passenger and express business. *United States* v. *Village of Hubbard,* 266 U. S. 474. It is insisted, however, that the limitation contained in § 418 applies, because in this case it is the electric line which is seeking relief. The contenton is

groundless. Moreover, the Commission found that the South Shore is also engaged in the general transportation of freight. Its finding is necessarily conclusive as the evidence taken before the Commission was not introduced below. *Louisiana Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114.

Affirmed.

Mr. Justice HOLMES took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.